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REPORTS

OF

C A S E S

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF THE

UNITED STATES.

February Term, 1820.

BY HENRY WHEATON,

Counsellor at Law.

VOLUME V.

NEW-YORK:

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1820.

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Southern District of New-York, ss:

BE IT REMEMBERED, that on the eleventh day of July, in the forty-fifth year of the Independence of the United States of America, HENRY WHEATON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author and proprietor, in the words and figures following, to wit:

"Reports of Cases argued and adjudged in the Supreme Court of the United States. February Term, 1820. By Henry Wheaton, Counsellor at Law. Volume V."

In conformity to the act of Congress of the United States, entitled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, "to the authors and proprietors of such copies, during the times therein mention-"ed;" and also, to an act, entitled, "An act supplementary to an act, entitled, an "act for the encouragement of learning, by securing the copies of maps, charts, "and books, to the authors and proprietors of such copies, during the times therein "mentioned, and extending the benefits thereof to the arts of designing, engraving, "and etching historical and other prints."

GILBERT LIVINGSTON THOMPSON,
Clerk of the Southern District of New-York.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.

The Hon. BUSHROD WASHINGTON, Associate Justice.

The Hon. WILLIAM JOHNSON, Associate Justice.

The Hon. BROCKHOLST LIVINGSTON, Associate Justice.

The Hon. THOMAS TODD, Associate Justice.

The Hon. GABRIEL DUVALL, Associate Justice.

The Hon. JOSEPH STORY, Associate Justice.

WILLIAM WIRT, Esq. Attorney-General.

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MEMORANDA.

The case of *Bullard* v. *Bell*, the decision of which in the Court below is reported in the first volume of Mr. Mason's Reports, p. 243, was argued at February Term, 1819, by Mr. *Pinkney* for the plaintiff, and by Mr. *Webster* for the defendant in error, in the absence of Mr. Justice Todd. The Judges then present being equally divided in opinion, the Court, at this Term, directed a new argument, and the cause was continued to the next Term, by consent of counsel, for that purpose.

The case of the *Amiable Isabella*, Munos, Claimant, was argued at this Term by the *Attorney-General*, Mr. *Pinkney*, and Mr. *Wheaton*, for the captors, and by Mr. *Harper* and Mr. *Gaston* for the claimant, and continued to the next Term for advisement.

The cases of *Love et al.* v. *Simm's Lessee*, argued by Mr. *Jones* for the plaintiff, and by the *Attorney-General* and Mr. *Harper* for the defendant in error, and of *Green* v. *Biddle*, argued by Mr. *B. Hardin* for the plaintiff, no counsel appearing for the defendant in error, were also continued to the next Term for advisement.

ADVERTISEMENT.

THE Editor of these Reports is engaged in preparing for the press an Analytical Digest of the Decisions of this Court, from its establishment in 1789, to the last Term, including the Decisions in the Continental Court of Appeals in Prize Causes, during the war of the revolution, which will be published during the present vacation.

REPORTS

OF

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1820.

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(CONSTITUTIONAL LAW.)

HOUSTON v. MOORE.

The act of the State of Pennsylvania, of the 28th of March, 1814, (providing, (sec. 21.) that the officers and privates of the militia of that State, neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of Congress of the 28th of February, 1795, c. 277., or to any penalty which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States, and also providing for the trial of such delinquents by a State Court Martial, and that a list of the delinquents fined by such Court should be furnished to the Marshal of the United States, &c. and also to the Comptroller of the Treasury of the United States, in order that the further proceedings directed to be had thereon by the laws of the United States might be completed,) is not repugnant to the constitution and laws of the United States.

THIS was a writ of error to the Supreme Court of the State of Pennsylvania, in a case where was drawn in question the validity of a statute of that

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State, on the ground of its repugnancy to the constitution and laws of the United States, and the decision was in favour of its validity. The statute which formed the ground of controversy in the State court, was passed on the 28th of March, 1814, and enacts, among other things, (sec. 21.) that every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of the Congress of the United States, passed on the 28th of February, 1795; and then proceeds to enumerate them, and to each clause adds—"or shall be liable to any penalty which may have been prescribed since the date of the passing of the said act, or which may hereafter be prescribed by any law of the United States." The statute then further provides that, "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by or in pursuance of orders from the President of the United States, the proper brigade inspector shall summon a general or a regimental Court Martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute; or who, after having marched therewith, shall have returned, without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said Court

Martial an accurate list. And as soon as the said Court Martial shall have decided in each of the cases which shall be submitted to their consideration, the President thereof shall furnish to the Marshal of the United States, or to his deputy, and also to the Comptroller of the Treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States, may be completed."

Houston, the plaintiff in error, and in the original suit, was a private, enrolled in the Pennsylvania militia, and belonging to the detachment of the militia which was ordered out by the Governor of that State, in pursuance of a requisition from the President of the United States, dated the 4th of July, 1814. Being duly notified and called upon, he neglected to march with the detachment to the appointed place of rendezvous. He was tried for this delinquency before a Court Martial summoned under the authority of the executive of that State, in pursuance of the section of the statute above referred to. He appeared before the Court Martial, pleaded not guilty, and was in due form sentenced to pay a fine; for levying of which on his property, he brought an action of trespass in the State Court of Common Pleas, against the Deputy Marshal by whom it was levied. At the trial in that Court, the plaintiff prayed the Court to instruct the Jury, that the first, second, and third paragraphs of the 21st section of the above statute of Pennsylvania, so far as they related to the militia called into the

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service of the United States, under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the constitution of the United States, and the laws of Congress made in pursuance thereof, and are, therefore, null and void. The Court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. A verdict and judgment was thereupon rendered for the defendant, Moore; which judgment being carried by writ of error before the Supreme Court of Pennsylvania, the highest court of law or equity of that State, was affirmed; and the cause was then brought before this Court, under the 25th section of the Judiciary Act of 1789, c. 20.

This cause was argued at the last term, and continued to the present term for advisement.

March 15th, 1819.

Mr. *Hopkins*, for the plaintiff in error, argued, that the constitutional power of Congress over the militia, is *exclusive* of State authority, except as to officering and training them according to the discipline prescribed by Congress. By the constitution of the United States, (art. 1. s. 8.) Congress is invested with power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." And also, "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively

the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The terms "to provide for calling forth," import an authority to place the militia under the power of the United States; in certain cases, implying a command, which the militia are bound to obey. Congress has exercised this authority by authorizing the President to call forth the militia in the cases mentioned in the constitution, and inflicting penalties on those who disobey the call.[a] Whenever a draft is made, the persons drafted are immediately, and to all intents and purposes, in the service of the United States, and from that moment all State authority over them ceases. The power to govern the militia, thus called forth, and employed in the service of the United States, is exclusively in the national government. A national militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government.[b] But even supposing this power not to be exclusively vested in Congress, and admitting it to be *concurrent* between the United States' government, and the respective State governments; as Congress have legislated on the subject matter, to the extent of the authority given, State legislation, which is subordinate, is necessarily excluded. Even where the grant of a certain power to the government of the Union is not,

a Act of the 28th of February, 1795, c. 277. (CI.)
b Livingston v. Van Ingen, 9 *Johns. Rep.* 507. 565. 575.

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in express terms, exclusive, yet if the exercise of it by that government be practically inconsistent with the exercise of the same power by the States, their laws must yield to the supremacy of the laws of the United States.[a] *Meade's* case is an example of the application of the same principle to the very question now before the Court.[b] Is it possible that Congress meant to give power to a State Court, without naming the Court, or granting the power in express terms? The exercise of this jurisdiction by a State Court Martial would either oust the United States' Courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offence. If the State Court could try them, the Governor of the State could pardon them for an offence committed against the laws of the United States. There is, in various particulars, a manifest repugnancy between the two laws. They are in direct collision; and, consequently, the State law is void. Again; if the State of Pennsylvania had power to pass the act of the 28th of March, 1814, or the 21st section of that act, it was superseded by the act of Congress of the 18th of April, 1814, c. 670., occupying the same ground, and making a more complete provision on the same subject. These two laws are still more manifestly repugnant and inconsistent with each other. Again; if the State law was constitutional, and not superseded by the act of Congress of the 18th of April, 1814, c. 670. still the treaty of peace

a Livingston v. Van Ingen, 9 *Johns. Rep.* 507. 565. 575.
b 5 *Hall's Law Journ.* 536.

between the United States and Great Britain, ratified in February, 1815, suspended and abrogated all proceedings under the State law.

Mr. *C. J. Ingersoll* and Mr. *Rogers*, contra, insisted, that there were many cases in which the laws of the United States are carried into effect by State Courts and State officers; that this was contemplated by the framers of the constitution; that the Governor of Pennsylvania, by whom the Court Martial, in the present case, was summoned, is the commander in chief of the militia of that State, except when called into the actual service of the United States. The militia drafted in pursuance of the requisition of the President were not in actual service, until mustered, and in the pay of the United States; until they reached the place of rendezvous, and were put under the command of the United States' officers. It is not the requisition, but the obedience to the requisition, which makes the persons drafted amenable to martial law, as a part of the military force of the Union. When the constitution speaks of the power of "calling forth" the militia, it means an effectual calling. The plaintiff was *called*, but not *called forth*. The power invested in Congress, is to determine in what mode the requisition shall be made; how the quota of each State is to be apportioned; from what States requisitions shall be made in particular cases; and by what process the call is to be enforced. Congress not having directed the mode by which Courts Martial are to be summoned and held for the purpose of enforcing it, the States have a constitutional

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authority to supply the omission. Before this Court proceeds to declare the State law made for this purpose to be void, it must be satisfied, beyond all doubt, of its repugnancy to the constitution.[a] The case must fall within some of the express prohibitory clauses of the constitution, or some of its clearly implied prohibitions. It must not be the exercise of a political discretion with which the legislature is invested, for that can never become the subject of judicial cognizance. It is insisted, that the power of Congress over the militia is a concurrent, and not an exclusive power. All powers, which previously existed in the States, and which are not expressly delegated to the United States, are reserved.[b] The power of making laws on the subject of the militia is not prohibited to the States, and has always been exercised by them. The necessity of a concurrent jurisdiction in certain cases results from the peculiar division of the powers of sovereignty in our government; and the principle, that all authorities of which the States are not expressly devested in favour of the Union, or the exercise of which, by the States, would be repugnant to those granted to the Union, are reserved to the States, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the constitution. The cotemporaneous construction of the constitu-

a Calder *et ux.* v. Bull *et ux.* 3 *Dall.* 399. Emerick v. Harris, 1 *Binney*, 416. 423. 6 *Cranch*, 87. Cooper v. Telfair, 4 *Dall.* 14. 18.

b Livingston *et al.* v. Van Ingen, 9 *Johns. Rep.* 501. 565. 573. *et seq.* 1 *Tuck. Bl. Com. Appx.* 308.

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tion, by those who supported its adoption, supposes the power in question to be concurrent, and not exclusive.[a] The power of the States over the militia is not taken away; it existed in them before the establishment of the constitution, and there being no negative clause prohibiting its exercise by them, it still resides in the States, so far as an exercise of it by them is not absolutely repugnant to the authority of the Union. Before the militia are actually employed in the service of the United States, Congress has only a power concurrent with that of the States, to provide for organizing, arming, and disciplining them. The authority of appointing the officers and training the militia, is expressly reserved to the States, because, in these respects, it was intended that they should have an *exclusive* power. So, also, Congress has the exclusive power of governing such part of the militia as may be actually employed in the service of the United States; but not until it is thus actually employed. The power of governing the militia, is the power of subjecting it to the rules and articles of war. But it is a principle manifestly implied in the constitution, that the militia cannot be subjected to martial law, except when in actual service, in time of war, rebellion, or invasion.[b] It necessarily results from the circumstance of the power of making provision for organizing, arming, and disciplining the militia being concurrent, that if

a Letters of Publius, or the Federalist, Nos. 27. 32. *Debates in the Virginia Convention*, 272. 284. 296. 298.

b 1 *Tucker's Bl. Com.* 213. Duffield v. Smith, 6 *Binney*. 306.

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Congress has not legislated upon any part of the subject, the States have a right to supply the omission. This right has been exercised, in the present case, in aid of, and not in hostility to, the federal authority. The fines which are collected under the law, are not appropriated to the use of the State, but are to be paid into the treasury of the Union. The power of making uniform laws of naturalization is different from that now under consideration. The power of naturalization is an authority granted to the Union, to which a similar authority in the States would be absolutely and totally repugnant. A naturalized citizen of one State would be entitled to all the privileges of a citizen in every other State, and the greatest confusion would be produced by a variety of rules on the subject. But even naturalization has been sometimes held to be a power residing concurrently in the Union and the States, and to be exercised by the latter in such a way as not to contravene the rule established by the Union.[a] But in the present case, the State law is not inconsistent with the act of Congress. It comes in aid of it. It supplies its defects, and remedies its imperfections. It co-operates with it for the promotion of the same end. The offence which is made punishable by the State law, is an offence against the State, as well as the Union. It being the duty of the State to furnish its quota, it has a right to compel the drafted militia to appear and march. *Calling the militia forth*, and *governing them* after they are in actual ser-

[a] Collet v. Collet, 2 *Dall.* 294. 296.

vice, are two distinct things. A State law, acting upon the militia *before* they have entered into the actual service of the Union, is so far from interfering with the power of Congress to legislate on the same subject, that it may have, and, we contend, that it does have, in the present case, a powerful effect in aid of the national authority. But it would be almost impossible for the State to enact a law concerning the militia, *after* they are in the actual service of the United States, which would not be irreconcilable with the authority of the latter. Even supposing that Congress should pass a law inflicting one penalty for disobedience to the call, and the State inflict another, they would still both co-operate to the same end. In practice, the delinquent could not be punished twice for the same offence; but there would be no theoretical repugnancy between the two laws. Congress, in the statutes enacted by them, have not intended to compel citizens enrolled in the militia to enter into the actual service of the United States. It is not a conscription; but a draft, with the option to the individual to be excused from a specific performance of the duty by the payment of a pecuniary composition. The acts of Congress are defective in not providing how, or by whom, Courts Martial shall be held, for the trial of delinquents, and the collection of these pecuniary penalties. The State legislature, acting with a sincere desire to promote the objects of the national government, supplied these defects, by adding such details as were indispensably necessary to execute the acts of Congress.

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There is, then, a perfect harmony between the two laws.

The judgment of the Court was delivered at the present term, by Mr. Justice WASHINGTON, who, after stating the facts of the case, proceeded as follows:

There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the Constitution of the United States, or not?

But before this question can be clearly understood, it will be necessary to inquire, 1. What are the powers granted to the general government, by the Constitution of the United States, over the militia? and, 2. To what extent they have been assumed and exercised?

1. The constitution declares, that Congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming, and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided, that the President of the United States shall be commander of the militia, when called into the actual service of the United States.

2. After the constitution went into operation, Congress proceeded by many successive acts to ex-

ercise these powers, and to provide for all the cases contemplated by the constitution.

The act of the 2d of May, 1792, which is re-enacted almost verbatim by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the States most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose, to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring, that every officer or private who should fail to obey the orders of the President, in any of the cases before recited, should be liable to pay a certain fine, to be determined and adjudged by a Court Martial, and to be imprisoned, by a like sentence, on failure of payment. The Courts Martial for the trial of militia, are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court, to the marshal of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

The act of the 18th of April, 1814, provides, that Courts Martial, to be composed of militia officers

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only, for the trial of militia, *drafted, detached and called forth for* the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting Courts Martial for the trial of delinquents in the army of the United States. Where the punishment prescribed, is by stoppage of pay, *or imposing a fine* limited by the amount of pay, the same is to have relation to the monthly pay existing *at the time the offence was committed.* The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the Court; the time of service, and other matters not so material to the present inquiry. The only remaining act of Congress which it will be necessary to notice in this general summary of the laws, is that of the 8th of May, 1792, for establishing an uniform militia in the United States. It declares who shall be subject to be enrolled in the militia, and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions, and companies, in such manner as the State legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided

for by other acts of Congress, and particularly by one passed on the third of January, 1795.

The laws which I have referred to, amount to a full execution of the powers conferred upon Congress by the constitution. They provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion. They also provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; leaving to the States respectively, the appointment of the officers, and the authority of training them according to the discipline prescribed by Congress.

This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But to my apprehension, the whole ground of Congressional legislation is covered by the laws referred to. The manner in which the militia is to be organized, armed, disciplined, and governed, is fully prescribed; provisions are made for drafting, detaching, and calling forth the State quotas, when required by the President. The President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper; neglect, or refusal to obey orders, is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence and punishment, to be adjudged by a Court Martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to

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be observed by these courts, is detailed with all necessary perspicuity.

If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a Court Martial, deriving its jurisdiction under State authority, to try, and to punish militia men, drafted, detached, and called forth by the President into the service of the United States, who have refused, or neglected to obey the call?

In support of the judgment of the Court below, I understand the leading arguments to be the two following: 1. That militia men, when called into the service of the United States by the President's orders, communicated either to the executive magistrate, or to any inferior militia officer of a State, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2dly. The State retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that so long as the militia are acting under the military jurisdiction of the State to which they belong, the powers of legislation over them are concurrent in the general and State government. Congress has power to provide for organizing, arming, and disciplining them; and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. But as State militia, the power of

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the State governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia, the State governments never had, or could have, jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist.

The first question then is, at what time, and under what circumstances, does a portion of militia, drafted, detached, and called forth by the President, enter into the service of the United States, and change their character from State to National militia? That Congress might by law have fixed the period, by confining it to the draft; the order given to the Chief Magistrate, or other militia officer of the State; to the arrival of the men at the place of rendezvous; or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them. But has Congress made any declaration on this subject, and in what manner is the will of that body, as expressed in the before mentioned laws, to be construed? It must be conceded, that there is

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no law of the United States which declares in express terms, that the organizing, arming, and equipping a detachment, on the order of the President, to the State militia officers, or to the militia men personally, places them in the service of the United States. It is true, that the refusal or neglect of the militia to obey the orders of the President, is declared to be an offence against the United States, and subjects the offender to a certain prescribed punishment. But this flows from the power bestowed upon the general government to call them forth; and, consequently, to punish disobedience to a legal order; and by no means proves, that the call of the President places the detachment in the service of the United States. But although Congress has been less explicit on this subject than they might have been, and it could be wished they had been, I am, nevertheless, of opinion, that a fair construction of the different militia laws of the United States, will lead to a conclusion, that something more than organizing and equipping a detachment, and ordering it into service, was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service, does not place it in the service, is clearly to be collected from the various temporary laws which have been passed, authorizing the President to require of the State executives to organize, arm, and equip their State quotas of militia for the service of the United States. Because they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all of them, au-

thorize the President to call *into actual service* any part, or the whole of said quotas, or detachments; clearly distinguishing between the orders of the President to *organize, and hold the detachments in readiness for service*, and their entering *into service.*

The act of the 28th of February, 1795, declares, that the militia *employed in the service* of the United States, shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia men, and for their families, in case of their death, are, by other laws, confined to such militia as are, or have been, in actual service. There are other laws which seem very strongly to indicate the *time* at which they are considered as being in service. Thus, the act of the 28th of February, 1795, declares, that a militia man called into the service of the United States, shall not be compelled to serve more than three months *after his arrival at the place of rendezvous*, in any one year. The 8th section of the act of the 18th of April, 1814, declares, that the militia, *when called into the service of the United States*, if, in the President's opinion, the public interest requires it, may be compelled to serve for a term not exceeding six months, *after their arrival at the place of rendezvous*, in any one year; and by the 10th section, provision is made for the expenses which may be incurred by marching the militia *to their places of rendezvous*, in pursuance of a requisition of the President, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous.

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The 3d section of the act of the 2d of January, 1795, provides, that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence *from the day of their appearing at the place of battalion, regimental, or brigade rendezvous*, allowing a day's pay and ration for every 15 miles from their homes to said rendezvous.

From this brief summary of the laws, it would seem, that *actual service* was considered by Congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is the *terminus a quo*, the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time, from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day. And, indeed, it would seem to border somewhat upon an absurdity, to say, that a militia man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that if Congress had pleased so to declare, a militia man, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But Congress has not so declared, nor have they made

any provision applicable to such a case; on the contrary, it would appear, that a fine to be paid by the delinquent militia man, was deemed an equivalent for his services, and an atonement for his disobedience.

If, then, a militia man, called into the service of the United States, shall refuse to obey the order, and is, consequently, not to be considered as in the service of the United States, or removed from the military jurisdiction of the state to which he belongs, the next question is, is it competent to the State to provide for trying and punishing him for his disobedience, by a Court Martial, deriving its authority under the State? It may be admitted at once, that the militia belong to the States, respectively, in which they are enrolled, and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such State, except so far as those laws are controlled by acts of Congress constitutionally made. Congress has power to provide for organizing, arming, and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if Congress had declined to exercise them, it was competent to the State governments to provide for organizing, arming, and disciplining their respective militia, in such manner as they might think proper. But Congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the State govern-

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ments enter upon the same ground—provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that unless such State laws are in direct contradiction to those of the United States, they are not repugnant to the Constitution of the United States.

From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of Congress, shall be a certain fine; if that provided by the State legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the Constitution of the United States, the benefit of which he may lawfully claim.

If, in a specified case, the people have thought proper to bestow certain powers on Congress as the safest depositary of them, and Congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the State legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different, where

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the laws flow from the wills of distinct, co-ordinate bodies.

This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

There still remains another question to be considered, which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania could not constitutionally legislate in respect to delinquent militia men, and to prescribe the punishment to which they should be subject, had the State Court Martial jurisdiction over the subject, so as to enforce the laws of Congress against these delinquents?

This, it will be seen, is a different question from that which has been just examined. That respects the power of a State legislature to legislate upon a subject, on which Congress has declared its will. This concerns the jurisdiction of a State military tri-

bunal to adjudicate in a case which depends on a law of Congress, and to enforce it.

It has been already shown that Congress has prescribed the punishment to be inflicted on a militia man detached and called forth, but who has refused to march; and has also provided that Courts Martial for the trial of such delinquents, to be composed of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war.

That Congress might have vested the exclusive jurisdiction in Courts Martial to be held and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offence to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the State tribunals. But an exclusive jurisdiction is not given to Courts Martial, deriving their authority under the national government, by express words:—the question then (and I admit the difficulty of it) occurs, is this a case in which the State Courts Martial could exercise jurisdiction?

Speaking upon the subject of the federal judiciary, the *Federalist* distinctly asserts the doctrine, that the United States, in the course of legislation upon the objects entrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal Courts solely, if it should be deemed expedient; yet that in every case, in which the State tribunals should not be expressly ex-

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cluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.[a]

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases, from the jurisdiction of the State Courts, is, as I think it must be, admitted.

The practice of the general government seems strongly to confirm this doctrine; for at the first session of Congress which commenced after the adoption of the constitution, the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the Courts created by that law, were clearly distinguished and marked; showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the Circuit Courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, ch. 75., concerning the forgery of the notes of the Bank of the United States, "that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States over offences made punishable by that act." A similar proviso is to be found in the act of the 21st of April,

[a] *Letters of Publius, or the Federalist. No. 82.*

1806, ch. 49., concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of Congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the State Courts over those offences; and there can be very little doubt but that this opinion was well founded. The judiciary act had vested in the federal courts exclusive jurisdiction of all offences cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The States could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of Congress. But by these savings Congress did provide, that the jurisdiction of the federal Courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the State Courts was instantly restored, so far as, under State authority, it could be exercised by them.

There are many other acts of Congress which permit jurisdiction over the offences therein described, to be exercised by State magistrates and Courts; not, I presume, because such permission was considered to be necessary under the constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national Courts by the judiciary act, and consequently could not be otherwise exercised by the State Courts. For I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts

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may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts.

What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men, who had disobeyed the call of the President to enter into the service of the United States; for, except the provisions for vesting this jurisdiction in such a Court, this act is, in substance, a re-enactment of the acts of Congress, as to the description of the offence, the nature and extent of the punishment, and the collection and appropriation of the fines imposed.

Why might not this Court Martial exercise the authority thus vested in it by this law? As to crimes and offences against the United States, the law of Congress had vested the cognizance of them exclusively in the federal Courts. The State Courts, therefore, could exercise no jurisdiction whatever over such offences, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the State Courts was *eo instanti* restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the State tribunals.

But military offences are not included in the act of Congress, conferring jurisdiction upon the Circuit

and District Courts; no person has ever contended that such offences are cognizable before the common law Courts. The militia laws have, therefore, provided, that the offence of disobedience to the President's call upon the militia, shall be cognizable by a Court Martial of the United States; but an exclusive cognizance is not conferred upon that Court, as it had been upon the common law Courts as to other offences, by the judiciary act. It follows, then, as I conceive, that jurisdiction over this offence remains to be concurrently exercised by the national and State Courts Martial, since it is authorized by the laws of the State, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia men, not engaged in the service of the United States; and the acts of Congress have not disturbed this state of things, by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The act of 1795 merely declares, that this offence shall be tried by *a Court Martial.* This was clearly not exclusive; but, on the contrary, it would seem to import, that such Court might be held under national, or State authority.

The act of 1814 does not render the jurisdiction necessarily exclusive. It provides, that Courts Martial for the trial of militia, drafted and called forth, shall, *when necessary,* be appointed, held, and conducted, in the manner prescribed by the rules of war.

If the mere assignment of jurisdiction to a particu-

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lar Court, does not necessarily render it exclusive, as I have already endeavoured to prove, then it would follow, that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military, and to civil Courts; and if there be a difference, I have not been able to perceive it. But the law uses the expression "when necessary?" How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say, that Courts Martial for the trial of militia called into service, should be formed and conducted in the manner prescribed by the law. The act of 1795, had declared who were liable to be tried, but had not said with precision before what Court the trial should be had. This act describes the Court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the act of 1795, should pay a certain fine, to be determined and adjudged by a Court Martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, *when necessary*, have no definite meaning, if they are confined to the existence of cases for trial before the Court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the States to provide for State Courts Martial to exercise a jurisdiction in the case, or of such Courts to take cognizance of them, when so authorized, they have an important, and a useful

meaning. If the State Court Martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States, to summon a Court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a Court Martial under the articles of war, to take, and to exercise the jurisdiction.

There are two objections which were made by the plaintiff's counsel, to the exercise of jurisdiction in this case, by the State Court Martial, which remain to be noticed.

1. It was contended, that if the exercise of this jurisdiction be admitted, that the sentence of the Court would either oust the jurisdiction of the United States' Court Martial, or might subject the accused to be twice tried for the same offence. To this I answer, that, if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a State Court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States.

Another objection is, that if the State Court Martial had authority to try these men, the Governor of that State, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but if he could, this would only furnish a reason why Congress should vest the jurisdiction in these cases, exclusively in a Court Martial acting under the authority of the United States.

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Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the State Court Martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere, or until the State of Pennsylvania shall withdraw from their Court Martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the Constitution of the United States, where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the Court *coram non judice;* and the judgment of the Supreme Court of Pennsylvania erroneous on these grounds.

Two of the judges are of opinion, that the law in question is unconstitutional, and that the judgment below ought to be reversed.

The other judges are of opinion, that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion.

Mr. Justice JOHNSON. It is not very easy to form a distinct idea of what the question in this case really is. An individual having offended against a law of his own State, has been cited before a Court constituted under the laws of that State, and there convicted and fined. His complaint is, that his offence was an

offence against the laws of the United States, that he is liable to be punished under those laws, and cannot, therefore, be constitutionally punished under the laws of his own State.

If any right secured to him under the State constitution has been violated, it is not our affair. His complaint before this Court must be either that some law, or some constitutional provision of the United States, has been violated in this instance; or he must seek elsewhere for redress. This Court can relieve him only upon the supposition that the State law under which he has been fined is inconsistent with some right secured to him, or secured to the United States, under the constitution. Now, the United States complain of nothing; the act of Pennsylvania was a candid, spontaneous, ancillary effort in the service of the United States; and all the plaintiff in error has to complain of is, that he has been punished by a State law, when he ought to have been punished under a law of the United States, which he contends he has violated.

I really have not been able to satisfy myself that it is any case at all for the cognizance of this Court; but from respect for the opinion of others, I will proceed to make some remarks on the questions which have been raised in the argument.

Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. It is obvious, that in those cases in

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which the United States may exercise the right of exclusive legislation, it will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the States at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also. In cases affecting life or member, there is an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both governments; and according to a very familiar principle of construction, this exception would seem to establish the existence of the general right. The actual exercise of this concurrent right of punishing is familiar to every day's practice. The laws of the United States have made many offences punishable in their Courts, which were and still continue punishable under the laws of the States. Witness the case of counterfeiting the current coin of the United States, under the act of April 21[illegible] 1806, in which the State right of punishing is [illegible]pressly recognized and preserved. Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway-robbery under the State laws, although made punishable under those of the United States.

With regard to militia men ordered into service, there exists a peculiar propriety in leaving them subject to the coercive regulations of both governments.

The safety of each is so worked up with that of all the States, and the honour and peculiar safety of a particular State may so often be dependant upon the alacrity with which her citizens repair to the field, that the most serious mortifications and evils might result from refusing the right of lending the strength of the State authority to quicken their obedience to the calls of the United States.

But, it is contended, if the States can at all legislate or adjudicate on the subject, they may affect to aid, when their real object is nothing less than to embarrass, the progress of the general government.

I acknowledge myself at a loss to imagine how this could ever be successfully attempted. Opposition, whether disguised or real, is the same thing. It is true, if we could admit that an acquittal in the State Courts could be pleaded in bar to a prosecution in the Courts of the United States, the evil might occur. But this is a doctrine which can only be maintained on the ground that an offence against the laws of the one government, is an offence against the other government; and can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the State Courts by statutory provisions of the United States. In contracts, the law is otherwise. The decision of any Court of competent jurisdiction is final, whatever be the government that gives existence to the Court. But crimes against a government are only cognizable in its own Courts, or in those which derive their right of holding jurisdiction from the offended government.

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Yet, were it otherwise, I cannot perceive with what correctness we can, from the possible abuse of a power, reason away the actual possession of it in the States. Such considerations were only proper for the ears of those who established the actual distribution of powers between the States and the United States. The absurdities that might grow out of an affected co-operation in the States, with a real view to produce embarrassment, furnish the best guaranty against the probability of its ever being attempted, and the surest means of detecting and defeating it. We may declare defects in the constitution, without being justly chargeable with creating them; but if they exist, it is not for us to correct them. In the present instance, I believe the danger imaginary, and if it is not, it must pass *ad aliud examen.*

But whatever be the views entertained on this question, I am perfectly satisfied that the individual in this case was not amenable to any law of the United States. Both that there was no law of the United States that reached his case, and that there was nothing done or intended to be done by the government of the United States, to bring him within their laws, before he reached the place of rendezvous.

It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, the other under authority of the United States. The power of Congress over the militia is limited but by two reservations in favour of the States, *viz.* the right of officering and that of training them. When distributed by the States under their own officers the general government have

the right, if they choose to exercise it, of designating both the officer and private who shall serve, and to call him forth or punish him for not coming. But the possession of this power, or even the passing of laws in the exercise of it, does not preclude the general government from leaning upon the State authority, if they think proper, for the purpose of calling the militia into service. They may command or request; and in the case before us, they obviously confined themselves to the latter mode. Indeed, extensive as their power over the militia is, the United States are obviously intended to be made in some measure dependant upon the States for the aid of this species of force. For, if the States will not officer or train their men, there is no power given to Congress to supply the deficiency.

The method of calling forth the militia by requisition, is, it is believed, the only one hitherto resorted to in any instance. Being partially dependant upon the integrity of the States, the general government has hitherto been satisfied to rest wholly on that integrity, and, except in very few instances, has never been disappointed. The compulsory power has been in its practice held in reserve, as only intended for use when the other shall fail. Historically it is known that the act of 1795 was passed with a view to a state of things then existing in the interior of Pennsylvania, when it became probable that the President of the United States would have to exert the authority of the general government immediately on detached portions of the officers or militia of the Union, to aid in the execution of the laws of

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the United States. And instances may still occur in which the exercise of that power may become necessary for the same purpose. But, whenever bodies of militia have been called forth for the purposes of general defence, it is believed, that in no instance has it been done otherwise than by requisition, the only mode practised toward the States from the commencement of the revolution to the present day. That it was the mode intended to be pursued in this case, is obvious from the perusal of the letter of the Secretary of War to the Governor of Pennsylvania.[a] The words made use of are: "The President

[a] *Letter from the Secretary of War, to the Governor of Pennsylvania.*

"War Department, July 4, 1814.

"SIR,

"The late pacification in Europe offers to the enemy a large disposable force, both naval and military, and with it the means of giving to the war here, a character of new and increased activity and extent.

"Without knowing, with certainty, that such will be its application, and still less, that any particular point or points will become objects of attack; the President has deemed it advisable, as a measure of precaution, to strengthen ourselves on the line of the Atlantic; and (as the principal means of doing this will be found in the militia) to invite the executives of certain States to organize and hold in readiness for immediate service a corps of ninety-three thousand five hundred men, under the laws of the 28th of February, 1795, and the 18th of April, 1814.

"The enclosed detail will show your Excellency what, under this requisition, will be the quota of Pennsylvania. As far as volunteer uniform companies can be found, they will be preferred. The expediency of regarding (as well in the designa-

has deemed it advisable to invite the Executives of certain States to organize," &c.: Words which no military man would construe into a military command.

It is true, that this letter also refers to the acts of 1795 and 1814, as the authority under which the requisition is made, and the act of 1795 authorises the President to issue *his order* for that purpose: but this makes no difference in the case; it only leaves him the power of proceeding by *order* if he thinks proper, without enjoining that mode, or depriving him of the option to pursue the other mode as long as the principles upon which the States acted were such as to render it advisable. Or, if the construction be otherwise, the result only will be, that the President has not pursued the mode pointed out by that act, and, therefore, has not brought the case within it.

But suppose the letter of the Secretary of War was intended by him to operate as an order, (although I cannot believe that Congress ever intended *an order* should issue immediately to the Governor of a

tions of the militia, as of their places of rendezvous,) the points, the importance or exposure of which will be most likely to attract the views of the enemy, need but be suggested.

"A report of the organization of your quota, when completed, and of its place, or places of rendezvous, will be acceptable.

"I have the honour to be, &c.

(Signed) "JOHN ARMSTRONG.

"P. S. The points to be defended, by the quota from Pennsylvania, will be the shores of the Delaware, Baltimore, and this city."

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State,) how is this individual made punishable under the acts of 1795 and 1814?

The doctrine must be admitted, that Congress might, if they thought proper, have authorized the issuing of the President's order even to the Governor. For when the constitution of Pennsylvania makes her Governor commander in chief of the militia, it must subject him in that capacity (at least when in actual service) to the orders of him who is made commander in chief of all the militia of the Union. Yet if he is to be addressed in that capacity, and not as the general organ or representative of the State sovereignty, surely he has a right to be apprised of it. But is he then to be charged as a delinquent? Where is the law that has provided, or can provide, a Court Martial for his trial? And where is the law that would oblige him to consider such a letter as this a military order? It would then seem somewhat strange, if he, to whom this letter was immediately addressed, received no *order* from the President, that one to whom his order was transmitted through fifty grades, should yet be adjudged to have disobeyed *the President's order.*

But the situation of the private in this case, is still more favourable. It must be recollected we are now construing a penal statute. And the criminality of the person charged, depends altogether on the 5th section of the act of 1795. The 1st section of the act of 1814, makes no difference in this particular, inasmuch as it does no more than create a tribunal for the trial of crimes, and supposes the commission of such crimes to be against the provisions of some existing law. *The command of the President* then,

I hold to have been indispensable to the creation of an offence under the 5th section of this act. But how the President could, in the actual state of things, have issued such a command to the private, consistently with the provisions of this act, it is not easy to show. For, by the section immediately preceding the 5th, it is provided, "That no officer, non-commissioned officer or private of the militia, shall be compelled to serve more than three months, after his arrival at the place of rendezvous, in any one year, *nor more than in due rotation with every other able bodied man of the same rank in the battalion to which he belongs.*" Now, what was meant by *due rotation?* and how was the President's order to reach the individual without previously establishing this *due rotation?* I admit, that this rotation may have been established, through the aid of a State law; but it became indispensable that such law should have been authorized or adopted by some law of Congress; and there exists no law that I know of, either authorizing or requiring the designation or distribution by the States, which this law contemplates. On a call of the whole militia, there would have been no difficulty; but in the case of a partial call, some designation legally known to the President became indispensable, before he could issue his orders with that precision which may well be required in a criminal prosecution. And this probably operated as forcibly as considerations of comity, in determining the government to proceed by the ancient mode of requisition, instead of addressing the executive of Pennsylvania in the language of command and au-

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thority; if, indeed, (what I will not readily admit,) the act was ever intended to apply to the case of an immediate order to the executive.

Pursuing the same course of reasoning a little further, we shall also be led to the conclusion, that neither could there be a Court constituted by a law of the United States for the trial of this offender. I hold it unquestionable, that whenever, in the statutes of any government, a general reference is made *to law*, either implicitly or expressly, that it can only relate to the laws of the government making this reference. Now the only act which it is pretended vests any Court with jurisdiction of offences created by the 5th section of the act of 1795, as to persons not yet mustered into service, is the 1st section of the act of 1814. The 4th and 6th sections of the act of 1795, taken together, furnish Courts Martial for the trial of offences committed by militia *employed* by the United States; and the act of 1814, I admit, was intended to act upon the offences of those who were not yet in actual service, but had been *called into service.* Can it, on any legal principle, be so construed as to answer the end proposed? The words are, "That Courts Martial for the trial of militia, drafted, detached and called forth for the service of the United States, shall be appointed," &c. But how drafted, detached, and called forth? Under the laws of the United States, or of Russia? For the laws of the States, unless adopted by Congress, are no more the laws of the United States than those of any foreign power. There is nothing in this act, or any other act, that designates the drafting, and detaching, or

calling forth, there expressed as the grounds of jurisdiction, as a drafting, &c. under the laws of a State. Nor would it have had such a drafting, &c. in view, if it was intended to provide for punishing offences against the provisions of the act of 1795; for, in that act it is required to be a calling forth by the President, not by State authority. And this suggests the only reasonable exposition that can be given it, consistent with the principle, that it must be a drafting, detaching, and calling forth under laws of the United States. If we can find a sensible and consistent exposition, we are bound to adopt it as the only one intended.

I have no doubt, that under the powers given the President by the act of 1795, and under the restriction contained in the 4th section of that act, it was in the power of the President to have issued orders to the Adjutant General of Pennsylvania, to bring into the field this quota of militia, and to have prescribed the manner in which they should be drafted and detached; and had this been done, every thing would have been sensible and consistent, and the exigencies of both these laws would have been satisfied. It is obvious, that the act of 1814 recognizes the construction which makes the *drafting*, and *detaching*, as necessary to precede the calling forth; and if the power to call forth existed in the President alone, it would seem that the other subordinate, but necessary ancillary powers to which this act has relation, must have existed in him also, and could be exercised by him, or under his authority only. Under this view of the subject, I am of

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opinion, that a Court Martial constituted under this act of April 18th, 1814, could not legally have tried this individual, because he was not drafted and detached under the meaning of that act, taken in connexion with the act of 1795. Neither, in my opinion, was the calling forth such as was in the contemplation of that act. In addition to the reasons already given for this opinion, exists this obvious consideration. The calling forth authorized by that act is to be expressed by an order from the President. It is disobedience to such an order alone that is made punishable by that act. Now, though it be unquestionable that this order may be communicated through any proper organ, yet it must be communicated to the individual as an order from the President, or he is not brought within the enactment of the law, nor put on his guard against incurring the penalty. But, from first to last, the whole case makes out an offence against the orders of the Governor of Pennsylvania. It does not appear, that the order communicated to the individual was made to assume the form of an order from the President; and how, in that case, he could have been held guilty of having violated *an order from the President*, it is not easy to conceive.

For these reasons I am very clearly of opinion, that neither the United States, nor the plaintiff in error, can complain of the infraction of any constitutional right, if the State did constitute a Court for trying offences against the laws of the United States, or ingraft those laws into its own code, and make offences against the United States punishable in its Courts; that if the individual has any cause of com-

plaint, it is between him and his own State government: And that even were it otherwise, the plaintiff in error does not make out such a case here; inasmuch as the general government could not have had it in contemplation to bring into operation the penal provisions of the act of 1795, and if they had, that they did not pursue the steps indispensable for that purpose; therefore, that the Court Martial by which the plaintiff in error was tried, was really acting wholly under the authority of State laws, punishing State offences.

But it is contended, that if the States do possess this power over the militia, they may abuse it. This is a branch of the exploded doctrine, that within the scope in which Congress may legislate, the States shall not legislate. That they cannot, when legislating within that ceded region of power, run counter to the laws of Congress, is denied by no one; but, as I before observed, to reason against the exercise of this power from the possible abuse of it, is not for a court of justice. When instances of this opposition occur, it will be time enough to meet them. The present was an instance of the most honourable and zealous co-operation with the general government. The legislature of Pennsylvania, influenced, no doubt, by views similar to those in which I have presented the subject, saw the defects in the means of coercing her citizens into the service; and, unwilling to bear the imputation of lukewarmness in the common cause, legislated on the occasion just as far as the laws of the United States were defective, or not brought into operation. And to vindicate her disinterestedness, she even gratui-

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tously surrenders to the United States the fines to be inflicted. To have paused on legal subtleties with the enemy at her door, or to have shrunk from duty under shelter of pretexts which she could remove, would have been equally inconsistent with her character for wisdom and for candour.

I will make one further observation in order to prevent myself from being misunderstood. I have observed, that the Governors of States, as military commanders, must be considered as subordinate to the President: I do not mean to intimate, nor have I the least idea, that the act of 1795 gives authority to the President to issue an order to a Governor in that capacity. I hold the opinion to be absurd; for he comes not within the idea of a *militia officer* in the language of that act. If he is so, what is his grade? He will not be included under any title of rank, known to the laws of the United States, from the highest to the lowest. And how is he to be tried? What is his pay?—what his punishment? An act which authorizes an *order* for militia, obviously authorizes *a requisition*. And if the purposes of the general government could as well be subserved by depending on the State authority for calling out the militia, there was no reason against resorting to that authority for the purpose. But the power of *ordering out* the militia is an alternative given to the President when the other is too circuitous or likely to fail. In that case, the President may address himself to the Executive; and having obtained through him the necessary information relative to the distribution and organization of the militia, may proceed,

under his own immediate orders, to draft and detach the numbers wanted. And thus every thing in the act becomes sensible, consistent, and adequate to the purposes in view, with the sole defect intended to have been remedied by the 1st section of the act of 1814.

In this case, it will be observed, that there is no point whatever decided, except that the fine was constitutionally imposed upon the plaintiff in error. The course of reasoning by which the judges have reached this conclusion are various, coinciding in but one thing, viz., that there is no error in the judgment of the State Court of Pennsylvania.

Mr. Justice STORY. The only question which is cognizable by this Court upon this voluminous record, arises from a very short paragraph in the close of the bill of exceptions. It there appears that the plaintiff prayed the State Court of Common Pleas to instruct the jury, that the first, second, and third paragraphs of the 21st section of the statute of Pennsylvania of the 28th of March, 1814, "so far as they related to the militia called into the service of the United States, under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the Constitution of the United States and the laws of Congress made in pursuance thereof, and are, therefore, null and void." The Court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. This opinion has been

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affirmed by the highest State tribunal of Pennsylvania, and judgment has been there pronounced in pursuance of it in favour of the defendant. The cause stands before us upon a writ of error from this last judgment; and the naked question for us to decide is, whether the paragraphs alluded to are repugnant to the constitution or laws of the United States; if so, the judgment must be reversed; if otherwise, it ought to be affirmed.

Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

The constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does,

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per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this Court have already held, the power to establish an uniform rule of naturalization,[a] and the delegation of admiralty and maritime jurisdiction.[b] In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being "the supreme law of the land," are of

a Chirac *v.* Chirac, 2 *Wheat.* 259. 269.

b Martin *v.* Hunter, 1 *Wheat.* 304. 337. And see *The Federalist*, No. 32.

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paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and probably to hazard the existence of the constitution itself. With these principles in view, let the question now before the Court be examined.

The constitution declares, that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

It is almost too plain for argument, that the power here given to Congress over the militia, is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment

of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia;" and is a limitation upon the authority, which would otherwise have devolved upon it as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia. What those powers are must depend upon their own constitutions; and what is not taken away by the Constitution of the United States, must be considered as retained by the States or the people. The exception then ascertains only that Congress have not, and that the States have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by Congress. Nor does it seem necessary to contend, that the power "to provide for organizing, arming, and disciplining the militia," is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter. But when once Congress has carried this power into effect, its laws for the organization, arming, and discipline of the militia, are the supreme law of the land; and all interfering State regulations must necessarily be suspended in their operation. It would certainly seem reasonable, that in the absence

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of all interfering provisions by Congress on the subject, the States should have authority to organize, arm, and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these, as necessary incidents. If Congress should not have exercised its own power, how, upon any other construction, than that of a concurrent power, could the States sufficiently provide for their own safety against domestic insurrections, or the sudden invasion of a foreign enemy? They are expressly prohibited from keeping troops or ships of war in time of peace; and this, undoubtedly, upon the supposition, that in such cases the militia would be their natural and sufficient defence. Yet what would the militia be without organization, arms, and discipline? It is certainly not compulsory upon Congress to exercise its own authority upon this subject. The time, the mode, and the extent, must rest upon its means and sound discretion. If, therefore, the present case turned upon the question, whether a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to Congress; and if not, then it is retained by the States. The fifth amendment to the constitution, declaring that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing

on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.

But Congress have, also, the power to provide "for governing such part of *the militia* as may be *employed* in the service of the United States." It has not been attempted in argument, to establish that this power is not exclusively in Congress; or that the States have a concurrent power of governing their own militia when in the service of the Union. On the contrary, the reverse has been conceded both here and before the other tribunals in which this cause has been so ably and learnedly discussed. And there certainly are the strongest reasons for this construction. When the militia is called into the actual service of the United States, by which I understand actual employment in service, the constitution declares, that the President shall be the commander in chief. The militia of several States may, at the same time, be called out for the public defence; and to suppose each State could have an authority to govern its own militia in such cases, even subordinate to the regulations of Congress, seems utterly inconsistent with that unity of command and action, on which the success of all military operations must essentially depend. There never could be a stronger case put from the argument of public inconvenience, against the adoption of such a doctrine. It is scarcely possible, that any interference, however small, of a State under such circumstances in the government of the militia, would not materially embarrass, and directly, or indirectly, impugn the authority of the Union. In most cases there would be an utter re-

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pugnancy. It would seem, therefore, that a rational interpretation must construe this power as exclusive in its own nature, and belonging solely to Congress.

The remaining clause gives Congress power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Does this clause vest in Congress an exclusive power, or leave to the States a concurrent power to enact laws for the same purposes? This is an important question, bearing directly on the case before us, and deserves serious deliberation. The plaintiff contends, that the power is exclusive in Congress; the defendant, that it is not.

In considering this question, it is always to be kept in view, that the case is not of a new power granted to Congress where no similar power already existed in the States. On the contrary, the States in virtue of their sovereignty, possessed general authority over their own militia; and the constitution carved out of that a specific power in certain enumerated cases. But the grant of such a power is not necessarily exclusive, unless the retaining of a concurrent power by the States be clearly repugnant to the grant. It does not strike me that there is any repugnancy in such concurrent power in the States. Why may not a State call forth its own militia in aid of the United States, to execute the laws of the Union, or suppress insurrections, or repel invasions? It would certainly seem fit that a State might so do, where the insurrection or invasion is within its own territory, and directed against its own existence or authority; and yet these are cases to which the pow-

er of Congress pointedly applies. And the execution of the laws of the Union within its territory may not be less vital to its rights and authority, than the suppression of a rebellion, or the repulse of an enemy. I do not say that a State may call forth, or claim under its own command, that portion of its militia which the United States have already called forth, and hold employed in actual service. There would be a repugnancy in the exercise of such an authority under such circumstances. But why may it not call forth, and employ the rest of its militia in aid of the United States, for the constitutional purposes? It could not clash with the exercise of the authority confided to Congress; and yet that it must necessarily clash with it in all cases, is the sole ground upon which the authority of Congress can be deemed exclusive. I am not prepared to assert, that a concurrent power is not retained by the States to provide for the calling forth its own militia as auxiliary to the power of Congress in the enumerated cases. The argument of the plaintiff is, that when a power is granted to Congress to legislate in specific cases, for purposes growing out of the Union, the natural conclusion is, that the power is designed to be exclusive.: That the power is to be exercised for the good of the whole, by the will of the whole, and consistent with the interests of the whole; and that these objects can no where be so clearly seen, or so thoroughly weighed as in Congress, where the whole nation is represented. But the argument proves too much; and pursued to its full extent, it would establish, that all the powers granted to Congress are

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exclusive, unless where concurrent authority is expressly reserved to the States. But assuming the States to possess a concurrent power on this subject, still the principal difficulty remains to be considered. It is conceded on all sides, and is, indeed, beyond all reasonable doubt, that all State laws on this subject are subordinate to those constitutionally enacted by Congress, and that if there be any conflict or repugnancy between them, the State laws to that extent are inoperative and void. And this brings us to a consideration of the actual legislation of Congress, and of Pennsylvania, as to the point in controversy.

In the execution of the power to provide for the calling forth of the militia, it cannot well be denied, that Congress may pass laws to make its call effectual, to punish disobedience to its call, to erect tribunals for the trial of offenders, and to direct the modes of proceeding to enforce the penalties attached to such disobedience. In its very essence too, the offence created by such laws must be an offence exclusively against the United States, since it grows solely out of the breach of duties due to the United States, in virtue of its positive legislation. To deny the authority of Congress to legislate to this extent, would be to deny that it had authority to make all laws necessary and proper to carry a given power into execution; to require the end, and yet deny the only means adequate to attain that end. Such a construction of the constitution is wholly inadmissible.

The authority of Congress being then unquestionable, let us see to what extent, and in what

manner it has been exercised. By the act of the 28th of February, 1795, ch. 101., Congress have provided for the calling forth of the militia in the cases enumerated in the constitution. The first section provides, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation, or Indian tribe, it shall be lawful for the President of the United States *to call forth such number of the militia of the State or States*, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and *to issue his orders* for that purpose, to such officer or officers of the militia as he shall think proper." It then proceeds to make a provision, substantially the same, in cases of domestic insurrections; and in like manner, the second section proceeds to provide for cases where the execution of the laws is opposed or obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. The fourth section provides, that "the militia *employed* in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States." The fifth section (which is very material to our present purpose) provides, "that every officer, non-commissioned officer, or private of the militia, *who shall fail to obey any of the orders of the President of the United States, in the cases before recited*, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a Court Martial; and such officer shall, moreover, be liable to be cashiered by a sentence of a Court Martial, and be

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incapacitated from holding a commission in the militia for a term not exceeding twelve months, at the discretion of the said Court; and such non-commissioned officers and privates shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." The sixth section declares, "that Courts Martial for the trial of militia, shall be composed of militia officers only." The seventh and eighth sections provide for the collection of the fines by the marshal and deputies, and for the payment of them when collected into the treasury of the United States.

The 2d section of the militia act of Pennsylvania, passed the 28th of March, 1814, provides, "that if any commissioned officer of the militia shall have neglected, or refused to serve, when called into actual service in pursuance of any order or requisition of the President of the United States, he shall be liable to the penalties defined in the act of Congress of the United States, passed on the 28th of February, 1795," and then proceeds to enumerate them; and then declares, "that each and every non-commissioned officer and private, who shall have neglected or refused to serve when called into actual service in pursuance of an order or requisition of the President of the United States, shall be liable to the penalties defined in the same act," and then proceeds to enumerate them. And to each clause is added, "or shall be liable to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law

of the United States." It then further provides, that "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by, or in pursuance of orders from the President of the United States, the proper brigade inspector shall summon a general, or a regimental Court Martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute, or who, after having marched therewith, shall have returned without leave from his commanding officer, of which delinquents, the proper brigade inspector shall furnish to the said Court Martial an accurate list. And as soon as the said Court Martial shall have decided in each of the cases which shall be submitted to their consideration, the president thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States may be completed."

It is apparent, from this summary, that each of the acts in question has in view the same objects, the punishment of any persons belonging to the militia of the State, who shall be called forth into the service of the United States by the President, and refuse to perform their duty. Both inflict the same penalties for the same acts of disobedience. In the act of 1795, it is the failure "to obey the orders of the

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President *in any of the cases before recited*;" and those orders are such as he is authorized to give by the first and second sections of the act, viz. to " call forth" the militia to execute the laws, to suppress insurrections, and repel invasions. In the act of Pennsylvania, it is the neglect or refusal " to serve when *called into actual service*, in pursuance of any orders of the President," which orders can only be under the act of 1795. And to demonstrate this construction more fully, the delinquent is made liable to the penalties defined in the same act; and this again is followed by a clause varying the penalties, so as to conform to those which from time to time may be inflicted by the laws of the United States for the same offence. So that there can be no reasonable doubt that the legislature of Pennsylvania meant to punish by its own Courts Martial, an offence against the United States created by their laws, by a substantial re-enactment of those laws in its own militia code.

No doubt has been here breathed of the constitutionality of the provisions of the act of 1795, and they are believed to be, in all respects, within the legitimate authority of Congress. In the construction, however, of this act, the parties are at variance. The plaintiff contends, that from the time of the calling forth of the militia by the President, it is to be considered as *ipso facto* " employed in the service of the United States," within the meaning of the constitution, and the act of 1795; and, therefore, to be exclusively governed by Congress. On the other hand, the defendant contends, that there is no distinction between the " calling forth," and the " employ-

ment in service" of the militia, in the act of 1795, both meaning actual mustering in service, or an effectual calling into service; that the States retain complete authority over the militia, notwithstanding the call of the President, until it is obeyed by going into service; that the exclusive authority of the United States does not commence until the drafted troops are mustered, and in the actual pay and service of the Union: and further, that the act of 1795 was never intended, by its language, to apply its penalties, except to militia in the latter predicament, leaving disobedience to the President's call to be punished by the States as an offence against State authority.

Upon the most mature reflection, it is my opinion, that there is a sound distinction between the "calling forth" of the militia, and their being in the "actual service" or "employment" of the United States, contemplated both in the constitution and acts of Congress. The constitution, in the clause already adverted to, enables Congress to provide for the government of such part of the militia "as may be *employed* in the service of the United States," and makes the President commander in chief of the militia, "when called into the *actual service* of the United States." If the former clause included the authority in Congress to call forth the militia, as being in virtue of the call of the President in actual service, there would certainly be no necessity for a distinct clause, authorizing it to provide for the calling forth of the militia; and the President would be commander in chief, not merely of the militia in actual service, but of the militia ordered into service.

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The acts of Congress, also, aid the construction already asserted. The 4th section of the act of 1795, makes the militia "employed in the service of the United States," subject to the rules and articles of war; and these articles include capital punishments by Courts Martial. Yet one of the amendments (art. 5.) to the constitution, prohibits such punishments, "unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," or in "the militia *when in actual service*, in time of war, or public danger." To prevent, therefore, a manifest breach of the constitution, we cannot but suppose that Congress meant, (what, indeed, its language clearly imports,) in the 4th section, to provide only for cases of actual employment. The act of the 2d of January, 1795, ch. 74. provides for the pay of the militia "when called into actual service," commencing it on the day of their appearance at the place of rendezvous, and allowing a certain pay for every fifteen miles travel from their homes to that place. The 97th article of the rules and articles of war (act of 10th of April, 1806, ch. 20.) declares, that the officers and soldiers of any troops, whether militia or others, being mustered, and in the pay of the United States, shall, at all times, and in all places, "*when joined, or acting in conjunction with the regular forces*" of the United States, be governed by these articles, and shall be subject to be tried by Courts Martial, in like manner with the officers and soldiers in the regular forces, save only that such Courts Martial shall be composed entirely of militia officers. And the act of the 18th of

April, 1814, (ch. 141.) supplementary to that of 1795, provides for like Courts Martial for the trial of militia, drafted, detached, and called forth for the service of the United States, "whether *acting* in conjunction with the regular forces *or otherwise*." All these provisions for the government, payment, and trial of the militia, manifestly contemplate that the militia are in actual employment and service, and not merely that they have been "called forth," or ordered forth, and had failed to obey the orders of the President. It would seem almost absurd to say that these men who have performed no actual service, are yet to receive pay; that they are "employed" when they refuse to be employed in the public service; that they are "*acting*" in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are subject to the rules and articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. In my judgment, there are the strongest reasons to believe, that by employment "in the service," or, as it is sometimes expressed, "in the actual service" of the United States, something more must be meant than a mere calling forth of the militia. That it includes some acts of organization, mustering, or marching done or recognised, in obedience to the call in the public service. The act of 1795 is not in its terms compulsive upon any militia to serve; but contemplates an option in the person drafted, to serve or not to serve; and if he pay the penalty in-

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flicted by the law, he does not seem bound to perform any military duties.

Besides, the terms "call forth" and "employed in service," cannot, in any appropriate sense, be said to be synonimous. To suppose them used to signify the same thing in the constitution, and acts of Congress, would be to defeat the obvious purposes of both. The constitution, in providing for the calling forth of the militia, necessarily supposes some act to be done before the actual employment of the militia; a requisition to perform service, a call to engage in a public duty. From the very nature of things, the call must precede the service; and to confound them is to break down the established meaning of language, and to render nugatory a power without which the militia can never be compelled to serve in defence of the Union. For of what constitutional validity can the act of 1795 be, if the sense be not what I have stated? If Congress cannot provide for a preliminary call, authorizing and requiring the service, how can it punish disobedience to that call? The argument that endeavours to establish such a proposition, is utterly without any solid foundation. We do not sit here to fritter away the constitution upon metaphysical subtleties.

Nor is it true that the act of 1795 confines its penalties to such of the militia as are in actual service, leaving those who refuse to comply with the orders of the President to the punishment that the State may choose to inflict for disobedience. On the contrary, if there be any certainty in language, the 5th section applies exclusively to those of the militia

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who are "called forth" by the President, and fail to obey his orders, or, in other words, who refuse to go into the actual service of the United States. It inflicts no penalty in any other case; and it supposes, and justly, that all the cases of disobedience of the militia, while in actual service, were sufficiently provided for by the 4th section of the act, they being thereby subjected to the rules and articles of war. It inflicts the penalty too, as we have already seen, in the identical cases, and none other, to which the paragraphs of the militia act of Pennsylvania now in question pointedly address themselves; and in the identical case for which the present plaintiff was tried, convicted, and punished, by the State Court Martial. So that if the defendant's construction of the act of 1795 could prevail, it would not help his case. All the difficulties as to the repugnancy between the act of Congress and of Pennsylvania, would still remain, with the additional difficulty, that the Court would be driven to say, that the mere act of calling forth put the militia, *ipso facto*, into actual service, and so placed them exclusively under the government of Congress.

In the remarks which have already been made, the answer to another proposition stated by the defendant is necessarily included. The offence to which the penalties are annexed in the 4th section of the act of 1795, is not an offence against State authority, but against the United States, created by a law of Congress, in virtue of a constitutional authority, and punishable by a tribunal which it has selected, and which it can change at its pleasure.

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almost the same with the clause now under consideration.

As to the argument itself, upon which the defendant erects his construction of this part of the act, its solidity is not admitted. It does not follow, because Congress have neglected to provide adequate means to enforce their laws, that a resulting trust is reposed in the State tribunals to enforce them. If an offence be created of which no Court of the United States has a vested cognizance, the State Court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the States have retained any power to enforce fines and penalties created by the laws of the United States in virtue of their general sovereignty, for that sovereignty did not originally attach on such subjects. They sprung from the Union, and had no previous existence. It would be a strange anomaly in our national jurisprudence to hold the doctrine, that because a *new* power created by the constitution of the United States was not exercised to its full extent, therefore the States might exercise it by a sort of process in aid. For instance, because Congress decline "to borrow money on the credit of the United States," or "to constitute tribunals inferior to the Supreme Court," or "to make rules for the government and regulation of the land and naval forces," or exercise either of them defectively, that a State might step in, and by its legislation supply those defects, or assume a general jurisdiction on these subjects. If, therefore, it be conceded, that Congress have not as yet legislated to the extent of organizing Courts Martial for the trial of offences created by the act of 1795, it is not conceded that

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therefore State Courts Martial may, in virtue of State laws, exercise the authority, and punish offenders. Congress may hereafter supply such defects, and cure all inconveniences.

It is a general principle too in the policy, if not the customary law of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs, and is confided, to the tribunals of the nation creating the offences. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals. It has been expressly held by this Court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by Congress to State tribunals;[a] and there is not the slightest inclination to retract that opinion. The judicial power of the Union clearly extends to all such cases. No concurrent power is retained by the States, because the subject matter derives its existence from the constitution; and the authority of Congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense. But even if Congress could delegate it, it would still remain to be shown that it had so done. We have seen that this cannot

[a] Martin v Hunter, 1 *Wheat. Rep.* 304. 337. S. P. United States v. Lathrop, 17 *Johns. Rep.* 4.

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be correctly deduced from the act of 1795; and we are, therefore, driven to decide, whether a State can, without such delegation, constitutionally assume and exercise it.

It is not, however, admitted, that the laws of the United States have not enabled Courts Martial to be held under their own authority for the trial of these offences, at least when there are militia officers acting in service in conjunction with regular troops. The 97th article of war gives an authority for the trial of militia in many cases; and the act of the 18th of April, 1814, ch. 141. (which has now expired,) provided, as we have already seen, for cases where the militia was acting alone. To what extent these laws applied is not now necessary to be determined. The subject is introduced solely to prevent any conclusion that they are deemed to be wholly inapplicable. Upon the whole, I am of opinion, that the Courts Martial intended by the act of 1795, are not State Courts Martial, but those of the United States; and this is the same construction which has been already put upon the same act by the Supreme Court of Pennsylvania.[a]

What, then, is the state of the case before the Court? Congress, by a law, declare that the officers and privates of the militia who shall, when called forth by the President, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a Court Martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties for

[a] *Ex parte* Bolson, 5 *Hall's Amer. Law Journal*, 476.

the same disobedience, and direct these penalties to be adjudged by a State Court Martial called exclusively under its own authority. The offence is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount, sovereign, in its execution. This is the real state of the case; and it is said, without the slightest disrespect for the legislature of Pennsylvania, who in passing this act were, without question, governed by the highest motives of patriotism, public honour, and fidelity to the Union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair, and the last to vindicate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the constitution.

It has not been denied, that Congress may constitutionally delegate to its own Courts exclusive jurisdiction over cases arising under its own laws. It is, too, a general principle in the construction of statutes, that where a penalty is prescribed to be recovered in a special manner, in a special Court, it excludes a recovery in any other mode or Court. The language is deemed expressive of the sense of the legislature, that the jurisdiction shall be exclusive. In such a case, it is a violation of the statute for any other tribunal to assume jurisdiction. If, then, we strip the case before the Court of all unnecessary

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appendages, it presents this point, that Congress had declared that its own Courts Martial shall have exclusive jurisdiction of the offence; and the State of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own Courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of Congress have constitutionally denied it. If an act of Congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a State legislature. The latter must be merely inoperative and void; for it seeks to give sanction to that which already possesses the highest sanction.

What are the consequences, if the State legislation in the present case be constitutional? In the first place, if the trial in the State Court Martial be on the merits, and end in a condemnation or acquittal, one of two things must follow, either that the United States' Courts Martial are thereby devested of their authority to try the same case, in violation of the jurisdiction confided to them by Congress; or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government. In the next place, it is not perceived how the right of the President to pardon the offence can be effectually exerted; for if the State legislature can, as the defendant contends, by its own enactment, make it a State offence, the pardoning power of the State

can alone purge away such an offence. The President has no authority to interfere in such a case. In the next place, if the State can re-enact the same penalties, it may enact penalties substantially different for the same offence, to be adjudged in its own Courts. If it possess a concurrent power of legislation, so as to make it a distinct State offence, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion, it is not liable to the control of the United States. It may enact more severe or more mild punishments than those declared by Congress. And thus an offence originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said that State legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true, (and it is believed to be so,) then it must be upon the ground that the offence cannot be made a distinct State offence, but is exclusively created by the laws of the United States, and is to be tried and punished as Congress has directed, and not in any other manner or to any other extent. Yet the argument of the defendant's counsel might be here urged, that the State law was merely auxiliary to that of the United States; and that it sought only to enforce a public duty more effectually by other penalties, in aid of those prescribed by Congress. The repugnancy of such a State law to the national authority would, nevertheless, be manifest, since it would seek

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to punish an offence created by Congress, differently from the declared will of Congress. And the repugnancy is not in my judgment less manifest, where the State law undertakes to punish an offence by a State Court Martial, which the law of the United States confines to the jurisdiction of a national Court Martial.

The present case has been illustrated in the argument of the defendant's counsel, by a reference to cases in which State Courts under State laws exercise a concurrent jurisdiction over offences created and punished by the laws of the United States. The only case of this description which has been cited at the bar, is the forgery of notes of the Bank of the United States, which by an act of Congress was punished by fine and imprisonment, and which under State laws has also been punished in some State Courts, and particularly in Pennsylvania.[a] In respect to this case, it is to be recollected, that there is an express proviso in the act of Congress, that nothing in that act should be construed to deprive the State Courts of their jurisdiction under the State laws over the offences declared punishable by that act. There is no such proviso in the act of 1795, and, therefore, there is no complete analogy to support the illustration.

That there are cases in which an offence particularly aimed against the laws or authority of the United States may, at the same time, be directed against State authority also, and thus be within the

a See White v. Commonwealth, 4 *Binn. Rep.* 418. Livingston v. Van Ingen, 9 *Johns. Rep.* 507. 567.

legitimate reach of State legislation, in the absence of national legislation on the same subject, I pretend not to affirm, or to deny. It will be sufficient to meet such a case when it shall arise. But that an offence against the constitutional authority of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a State Court, in virtue of a State law creating a like offence, and defining its punishment, without the consent of Congress, I am very far from being ready to admit. It seems to me, that such an exercise of State authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offence, as for instance, treason against the United States: can a State legislature vest its own Courts with jurisdiction over such an offence, and punish it either capitally or otherwise? Can the national Courts be ousted of their jurisdiction by a trial of the offender in a State Court? Would an acquittal in a State Court be a good bar upon an indictment for the offence in the national Courts? Can the offender, against the letter of the constitution of the United States, "be subject for the same offence, to be twice put in jeopardy of life or limb?" These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative. The case, then, put by the defendant's counsel, clears away none of the embarrassments which surround their construction of the case at the bar of the Court.

Upon the whole, with whatever reluctance, I feel myself bound to declare, that the clauses of the mi-

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litia act of Pennsylvania now in question, are repugnant to the constitutional laws of Congress on the same subject, and are utterly void; and that, therefore, the judgment of the State Court ought to be reversed. In this opinion I have the concurrence of one of my brethren.

Judgment affirmed.

5wh 76
134 628
135 261
40f 638
5wh 76
43f 25
5wh 76
47f 884
5wh 76
49f 362
5wh 76
51f 810
52f 580
5wh 76
150 267
150 282
5wh 76
152 575
5wh 76
56f 771
5wh 76
64f 640
5wh 76
73f 125
5wh 76
170 280
5wh 76
78f 291
5wh 76
79f 64
5wh 76.
175 265
5wh 76
f177 310
5wh 76
f98f 293
98f 294

(Constitutional Law.)

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The Courts of the United States have no jurisdiction, under the act of April 30th, 1790, c. 36. of the crime of manslaughter, committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the river Tigris, in the empire of China, 35 miles above its mouth, off Wampoa, about 100 yards from the shore, in four and a half fathoms water, and below low water mark.

Though penal laws are to be construed strictly; yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

In the act of April 30th, 1790, c. 36. the description of *places* contained in the 8th section, within which the offences therein enumerated must be committed, in order to give the Courts of the Union jurisdiction over them, cannot be transferred to the 12th section, so as to give those Courts jurisdiction over a manslaughter committed in the river of a foreign country, and not on the high seas.

This was an indictment for manslaughter, in the Circuit Court of Pennsylvania. The jury found the defendant guilty of the offence with which he

5 wh 76
5 L-ed 37
117 f 465
117 f 467
117 f 468
j119 f 13
j119 f 14
119 f 741

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stood indicted, subject to the opinion of the Court, whether this Court has jurisdiction of the case, which was as follows:

The manslaughter charged in the indictment, was committed by the defendant, on board of the American ship the Benjamin Rush, on a seaman belonging to the said ship, whereof the defendant was master, in the river Tigris, in the empire of China, off Wampoa, and about 100 yards from the shore, in four and a half fathoms water, and below the low water mark, thirty-five miles above the mouth of the river. The water at the said place where the offence was committed, is fresh, except in very dry seasons, and the tide ebbs and flows at, and above the said place. At the mouth of the Tigris, the government of China has forts on each side of the river, where custom-house officers are taken in by foreign vessels to prevent smuggling. The river at the mouth, and at Wampoa, is about half a mile in breadth.

And thereupon, the opinions of the Judges of the Circuit Court, being opposed as to the jurisdiction of the Court, the question was by them stated, and directed to be certified to this Court.

Feb. 14*th.*

Mr. *C. J. Ingersoll*, for the United States, argued, that by the Constitution the judicial power extends to all cases of admiralty and maritime jurisdiction, and Congress is invested with authority to define and punish piracies and other felonies committed on the high seas. The judiciary act of 1789, c. 20. s. 11. gives jurisdiction over these offences to the Circuit Court. The act of April 30th, 1790. c. 36. for

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the punishment of certain crimes against the United States, s. 12. provides for the punishment of manslaughter committed on the high seas.[a] But it is un-

a The sections of this act commented on in the argument, are as follows:

Sec. I. That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted, on confession in open Court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

Sec. II. And be it enacted, That if any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not as soon as may be disclose and make known the same to the President of the United States, or some of the Judges thereof, or to the President or Governor of a particular State, or some one of the Judges or Justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

Sec. III. And be it enacted, That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death.

Sec. VI. And be it enacted, That if any person or persons, having knowledge of the actual commission of the crime of wilful murder, or other felony, upon the high seas, or within any fort, arsenal, dockyard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not, as soon as may be, disclose and make known the same to some one of the Judges, or other

derstood to be objected, 1. That the civil, or Roman law, which is the admiralty code, does not recognise

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persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

SEC. VII. And be it enacted, That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

SEC. VIII. And be it enacted, That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or, if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

SEC. IX. And be it enacted, That if any citizen shall commit any piracy or robbery, aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under colour of any commission from any foreign prince

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or define the offence of manslaughter.[a] To which it is answered, that Congress, having declared that

or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of authority, be deemed, adjudged, and taken to be, a pirate, felon, and robber, and on being thereof convicted, shall suffer death.

Sec. X. And be it enacted, That every person who shall either upon the land or seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons to do or commit any murder or robbery, or other piracy aforesaid, upon the high seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person, so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be, accessary to such piracies before the fact, and every such person, being thereof convicted, shall suffer death.

Sec. XI. And be it enacted, That after any murder, felony, robbery, or other piracy whatsoever, aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged, to be accessary to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned, not exceeding three years, and fined, not exceeding five hundred dollars.

Sec. XII. And be it enacted, That if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt or endeavour to corrupt any commander, master,

[a] 1 *Bro. Civ. and Adm. Law*, 422. 2 *Bro.* 460.

any person convicted of manslaughter, shall be punished in the manner provided by the act, the common law may be referred to for a definition of the offence.[a] Neither robbery, murder, mayhem, nor many other offences, made punishable by the statute laws of the United States, are defined by those laws. The distinctions of homicide, as marked out by the common law, are unknown to the civil or Roman law. But when jurisdiction is given of murder committed on the high seas, &c. to a Court of Admiralty, the law defining the crime is to be derived from the common, and not from the civil law.[b] It is also objected, 2. That the local jurisdiction of the Chinese empire over the offence charged by the indictment, if found by the jury to have been committed within its territorial limits, necessarily excludes the jurisdiction of the Courts of this country over the offence.

officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandize, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions, of any kind; or shall fit out any vessel, knowingly, and with a design, to trade with or supply or correspond with any pirate or robber upon the seas; or if any persons shall any ways consult, combine, confederate, or correspond, with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make revolt in such ship; such person or persons, so offending, and being thereof convicted, shall be imprisoned, not exceeding three years, and fined, not exceeding one thousand dollars.

a The United States v. Palmer, 3 *Wheat.* 626.

b The United States v. M'Gill, 4 *Dall.* 426. 429.

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To this objection, it is answered, that by the principles of universal law, a qualified national jurisdiction and immunity extends to the ships of the nation, public and private, wherever they may be. As to *public* vessels, this immunity is unquestionable.[a] And even *private* vessels, though from the necessity of the case, subject to the revenue laws of the country where they may be, are yet in many respects exempted from the local jurisdiction. Minor crimes, which do not offend the safety or dignity of the local sovereignty, are usually left to the cognizance of the government to whose subjects the vessel belongs. Nor does this, in the slightest degree, affect the eminent domain and sovereignty of the foreign nation over its harbours and rivers.[b] But China herself disclaims jurisdiction in such cases, and *renvoys* them to the forum of the offending party.[c] The offence here, being

a *Vattel, L.* 1. *c.* 19. *s.* 216. The Exchange, 7 *Cranch*, 116. Case of Nash, *alias* Robbins, *Bee's Adm. Rep.* 266. *Vide* APPENDIX, Note I.

b 2 *Bro. Civ. & Adm. Law*, 468. 484. M'Gill's case, 4 *Dall.* 427. United States v. Ross, 1 *Gallis.* 627. United States v. Smith, 1 *Mason*, 147. United States v. Hamilton, 1 *Mason*, 152.

c *Sir George Staunton's Translation of the Laws of China*, 36. 523. The following extracts from this work were read at the argument, and it is thought their insertion here will not be unacceptable to the learned reader.

"*Offences committed by foreigners.*(*) In general all foreigners who come to submit themselves to the government of the empire, shall, when guilty of offences, be tried and sentenced according to the established laws. The particular decisions, however, of the tribunal Lee-Fan-Yuen,(†) shall be guided

committed by a citizen of the United States upon another citizen, on board a merchant vessel of this

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according to regulations framed for the government of the Mongol tribes.

Note (*)—"This section of the code has been expressly quoted by the provincial government of Canton, and applied to the case of foreigners residing there and at Macao for the purposes of trade. The laws of China have never, however, been attempted to be enforced against those foreigners, except with considerable allowances in their favour, although, on the other hand, they are restricted and circumscribed in such a manner, that a transgression on their part of any specific article of the laws, can scarcely occur; at least, not without at the same time implicating and involving in their guilt some of the natives, who thus in most cases become the principal victims of offended justice. The situation of Europeans in China is certainly by no means so satisfactory on the whole as might be desired, or even as it may be reasonably expected to become in the progress of time, unless some untoward circumstance should occur to check the gradual course of improvement. It must be admitted, however, that the extreme contrariety of manners, habits, and language, renders some such arrangement, as that now subsisting for the regulation of the intercourse between the Europeans and the natives, absolutely indispensable, as well as conducive to the interests of both parties.

Note (†)—This tribunal might be stiled the office or department for foreign affairs, but its chief concern is with the tributary and the subject States of Tartary." p. 36.

"The foregoing being the substance of the report of the viceroy to his imperial majesty, we have deliberated thereon, and have ascertained that, according to the preliminary book of the penal code, all persons from foreign parts committing offences, shall undergo trial, and receive sentence according to the laws of the empire: Moreover, we find it declared in the same code, that any person accidentally killing another, shall be allowed to redeem himself from punishment, by the payment of

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country, lying in the waters of a foreign country, which expressly disclaims jurisdiction of the case, it is dispunishable, unless it be punishable in the Courts of this country; and it appears at least questionable, whether there is any constitutional power in Congress to punish it, except in the mode already provided for, as an offence committed *on the high seas.* This brings us to the 3d objection, which is, that the offence was not committed "on the high seas," within the true intent and meaning of the act of April, 1790. c. 36. s. 12. In answer to this objection, it is insisted, that before the adoption of the present

a fine; lastly, we find, that on the eighth year of Kien-Lung, (1743,) it was ordered, in reply to the address of the viceroy of Canton, then in office, that thenceforward, in all cases of offences by contrivance, design, or in affrays happening between foreigners and natives, whereby such foreigners are liable, according to law, to suffer death by being strangled or beheaded, the magistrate of the district shall receive the proofs and evidence thereof, at the period of the preliminary investigation, and after having fully, and distinctly inquired into the reality of the circumstances, report the result to the viceroy and sub-viceroy, who are thereupon strictly to repeat and revise the investigation. If the determination of the inferior Courts, upon the alleged facts, and upon the application of the laws, is found to have been just and accurate, the magistrate of the district shall, lastly, receive orders to proceed, in conjunction with the chief of the nation, to take the offender to execution, according to his sentence.

"In all other instances of offences committed under what the laws declare to be palliating circumstances, and which are, therefore, not capitally punishable, the offender shall be sent away to be punished in his own country. February, 1808." p. 523.

constitution, the admiralty and maritime jurisdiction extended every where on tide waters below low water mark.[a] The same extension has been given to the admiralty jurisdiction under the constitution.[b] The opposite argument is founded on the expression "*high seas*," as contradistinguished from that portion of the sea, where the tide ebbs and flows, but which is enclosed by head lands, or forms parts of rivers above their mouths. But the celebrated statutes of *Richard* II., regulating the admiralty jurisdiction, allow the Admiral to have cognizance of things done on the *sea*, "*sur le meer*," without the addition of *high*. The stat. 27 *Eliz.* uses the expression "main sea." The 28 *Hen.* VIII. c. 15., concerning the trial of crimes committed within the admiralty jurisdiction, uses the terms, "in and upon the sea, or in any other haven, creek, river, or place, where the Admiral hath, or pretends to have, power, authority, or jurisdiction."[c] The act of Congress of 1790. c. 9. uses the terms promiscuously, "high seas," (s. 8. s. 9.) "the seas," (s. 10.) "the sea," (s. 11.) "high seas and seas," (s. 12.) The term "sea" is *water*, as contradistinguished from *land*. The term "*high* sea," does not necessarily import *deep sea;* although the classical writers frequently use the correspondent Latin word in that figurative

a See authorities cited, 3 *Wheat.* 357. Note *b*, to United States v. Bevans. De Lovio v. Boit, 2 *Gallis.* 470. Note 47.

b United States v. La Vengeance, 3 *Dall.* 297. The Sally, 2 *Cranch*, 406. The Betsey and Charlotte, 4 *Cranch*, 443. The Samuel, 1 *Wheat.* 9. The Octavia, *ib.* 20.

c See The King v. Bruce, cited 3 *Wheat.* 371. Note *a*.

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sense; as *altum æquor*, *altissimum flumen*, &c. It is a common expletive applied, in both languages, to "sea," "road," "crime," and many other things. The contrary acceptation of the term "*high* sea," would exclude bays, arms of the sea, coves, belts, straits, estuaries, great rivers, and lakes. There is no other limit to the sea, but that where the tide ceases to ebb and flow, whether on the sea coast, or in bays and rivers. Even the English statutes of Richard II., made to restrict the admiralty jurisdiction, and in derogation of its ancient authority, give it cognizance of murders, &c. committed on board great ships in the streams of great rivers below the first bridges. So the French law gives the admiralty the same jurisdiction, as to rivers, for which we contend.[a] The case of the United States v. Bevans,[b] does not stand in our way, for the point now in question was not determined in that case.

Mr. *Sergeant*, contra, stated, that the indictment in this case, pursuing the words of the act, charges the offence to have been committed upon the "high seas." It is of no consequence what may be the extent of the power given by the constitution to the government of the Union. The question is, to what extent has the power so given been exercised? It is not necessary, therefore, to inquire whether this was an offence within the admiralty jurisdiction. The only question is, whether it is within the true mean-

a 1 *Valin, Com. sur l'Ordon. liv.* 1. *tit.* 2. *De la Competence, art.* 5.

b 3 *Wheat.* 336.

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ing of the act of Congress.[a] The offence in question, if committed at all, was not committed upon the *high* seas: whether these terms be considered in their ordinary sense; as used in foreign authorities of the law; as employed in acts of Congress; as used in the act in question; or as expounded by our own judicial decisions. 1. The national character of the ship or vessel in which the offence was committed, makes no difference in this case. A *public* armed vessel is a part of the national sovereign force, clothed with the sovereign character, and wherever she goes entitled to immunity. She is subject only to the jurisdiction of her sovereign, and is a part of his territory;[b] is exempt from visitation and search, and governed by such laws as her sovereign may choose to give her. The immunity she enjoys does not depend upon the civil or admiralty law; but, like the privilege of an ambassador, or the immunity of troops on their passage, depends upon the law of nations. Every sovereign may refuse admission, but having admitted, is bound to respect. Still, it does not follow, that the Courts of her own country have jurisdiction on board of her. Be this as it may, *a private* ship has no such immunity. On the *ocean* she is bound to submit to visitation and search. In *port*, she is bound to submit to the local jurisdiction, and entitled to the benefit of the laws of the place. Those who are on board of her, incur the obligation

a The United States v. Bevans, 3 *Wheat.* 336. 386.

b The Exchange, 7 *Cranch*, 116. Speech of Mr. (now Chief Justice) MARSHALL, in the case of Nash *alias* Robbins, APPENDIX, Note I.

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of a temporary allegiance, and are, in all respects, amenable to the laws of the country in which they are found; to its penal laws especially. The *ocean*, the *high seas*, are a common domain; and every ship, private as well as public, is *there* upon the *territory* of her sovereign; and amenable to no laws, but the laws of her sovereign, and the law of nations. It is from *this principle* that every nation derives its jurisdiction over the persons on board its ships: the spot they occupy in the *common domain*, is its own territory, and it has a right to give the law to it.[a] 2. The national character of the offender, or of the person offended, makes no difference. If the crew had all shipped in England, and been English subjects, they would have been equally entitled to protection, and equally amenable to our laws. If, upon the ocean, or high seas, a foreigner had been murdered, his death would have been equally avenged by our laws. If a foreigner on board this ship, had committed an offence, he would equally have been liable. It is not correct, then, to say, that personal jurisdiction is universal, as to citizens; nor that it does in no case extend to foreigners. 3. In the next place, the extent or true nature of the constitutional power is wholly immaterial in this case. That instrument had in view, 1st. To partition powers between the Union and the States; 2dly. To distribute powers among the different branches of the national government. The judicial power, in its exercise, is subordinate and auxiliary to the power of Congress. The whole

[a] 1 *Sir L. Jenkins' Works*, 91.

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jurisdiction has never been exercised. But the principle, in its application to the very case, has been decided in the case of the United States v. Bevans.[a] It follows, therefore, that the judicial authority is of no avail, unless there be a corresponding power in Congress; that as the judicial authority is unavailing without a legislative act, it is to the act of Congress alone we must look for the extent of the jurisdiction. When, therefore, the authority of the judiciary is declared to extend to all cases of "admiralty and maritime jurisdiction," it is to be extended only to such cases as Congress have power to provide for. The same power might be exercised through the medium of the State Courts, or omitted altogether. It follows, also, most indubitably, that the powers exercised by Congress, can receive no illustration from the powers given to the judiciary by the constitution; and we are thus happily relieved from the necessity of exploring the distant speculation of the ancient jurisdiction of the admiralty. 4. What, then, is the true meaning of the terms, on the "high seas," as used in the act of Congress? In their ordinary sense, they mean the open ocean, as distinguished from creeks, rivers, ports, and other bodies of water, inclosed and infra-territorial. The flow of the tide cannot be the true test; for then the sea would flow to the falls of Schuylkill and Delaware, and would comprehend a vessel moored at the wharf. If we refer to the authorities

[a] 3 *Wheat.* 336. 386.

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of the English law, they are clear and uniform. The common lawyers never at any period denied the admiralty jurisdiction upon the "high seas." The civilians claimed a jurisdiction beyond what was conceded to them by the common lawyers, beyond the "high seas;" in rivers, bays, &c. Thus, the very contest, in its origin, admitted that the "high seas" were distinguishable from other waters. The statute 13 Richard II. confined the admiralty to things done upon the "sea."[a] The 15 Richard II. gave it criminal jurisdiction in homicide and mayhem on *great rivers*, &c.[b] The 27 Eliz. c. 11. is conclusive of the question.[c] Sir Leoline Jenkins makes the distinction expressly.[d] So, also, we have the authority of Lord Hale in many places;[e] and all the authorities agree that the *divisum imperium* is only upon the sea coast. The distinction is also perfectly understood and maintained in our own legislation; and the act now in question furnishes the clearest recognition of it, as will appear by a comparison of the 8th with the 12th section. In the 8th section, the distinction is made between the "high seas," and "a river, haven, basin, or bay." The latter expressions can never, by any fair rule of construction applied to penal statutes, be transferred from the 8th to the 12th section. In criminal cases, a strict construction is always to be preferred; and if there be

a 4 *Inst.* 136. *b* 4 *Inst.* 137.

c 4 *Inst.* 137. *d* 1 *Life of Sir L. J.* 77.

e Hale, De Jure Maris, c. 4. 2 *East's C. L.*, 304. 2 *Hale's P. C. ch.* 3.

doubt, that is of itself conclusive. In Bevan's case, the distinction between the high seas and other enclosed parts of the sea, was not denied by the counsel for the United States, and the Court do not even mention it as at all doubtful.[a] But, it is asked, whether the criminal jurisdiction of the admiralty is not as extensive as the civil? To which it is answered, that the *criminal* jurisdiction depends upon the *place* where the offence is committed; the *civil*, upon the nature of the subject; and there can, therefore, be no comparison of their extent.

The *Attorney General*, in reply, insisted, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. If a case be within the intention and reason, it must be considered as within the letter, of the statute. This act having been passed by Congress on the first organization of the government, it must have been their intention to make the exercise of their power co-extensive with their jurisdiction; and to punish all the crimes enumerated, in every place within their jurisdiction. The act must, therefore, be construed so as to engraft the words of the 8th section, descriptive of the place in which *murder* may be committed, on the 12th section, which describes the place in which *manslaughter* may be committed. After expressing themselves fully in the previous section as to the places in which one of the crimes intended to be punished by the act must be committed, it was natural that the legislature

[a] 3 *Wheat.* 336.

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should suppose the language engrafted into a subsequent section on a subject of the same class. Thus, the 1st section of the act defines the crime of treason, and provides, "that if any person or persons owing allegiance to the United States of America, shall levy war," &c. "such person or persons shall be adjudged guilty of treason," &c. The 2d section defines misprision of treason, and in specifying the persons who may commit the crime, omits the words "owing allegiance to the United States," and uses without limitation or restriction the general terms "any person or persons." Yet these general terms were obviously intended to be restrained by the words "owing allegiance to the United States," which are used in the preceding section. The crimes of murder and manslaughter are kindred offences, and are parts of the same general offence of homicide. Congress must have intended to make the same provision for their punishment, as to the places within which they must be committed in order to give jurisdiction to the Courts of the Union. Thus, the 3d section of the act describes the places on land in which murder must be committed in order to give those Courts jurisdiction of the offence; and the 7th section describes in the very same terms the places on land in which manslaughter must be committed in order to give them jurisdiction. Observe the consequences of a contrary construction as to murder alone. The 9th section extends the guilt of the offences enumerated in it to a citizen of the United States committing them under colour of a foreign commission. But this section, in describing

the place where the offence may be committed, omits the words "in any river, haven, basin, or bay," and uses the words "high seas" only. It is incredible that it was the legislative intention to distinguish between the same crime, committed under the pretext of authority by a foreign commission, on the high seas, and on the waters of a foreign State, or of the United States. So, also, the 10th section provides, "that every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons, to do or commit any murder or robbery, or other piracy, aforesaid, upon the seas, which shall affect the life of such person, shall," &c. Here Congress cannot have intended to exempt from punishment those persons who shall be accessaries before the fact to a murder or robbery committed "in a river, haven, basin, or bay," &c. A similar argument is applicable to the 11th section. As to the 12th section, beside the offence of manslaughter, the other offences which it enumerates are all accessorial to those mentioned in the 8th. It is, therefore, evidently connected with the 8th.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court. The indictment in this case is founded on the 12th section of the act, entitled, "an act for the punishment of certain crimes against the United States." That section is in these words: "And be it enacted, that if any seaman, or other person, shall commit manslaughter on the high seas, or confederate," &c. "such person or persons so offending,

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and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

The jurisdiction of the Court depends on the place in which the fact was committed. Manslaughter is not punishable in the Courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still farther opposed, by a comparison of the 12th with the 8th section of the act. In the 8th section, Congress has shown its attention to the distinction between the "high seas," and "a river, haven, basin, or bay." The well known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

On the part of the United States, the jurisdiction of the Court is sustained, not so much on the extension of the words "high seas," as on that construction of the whole act, which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the other, is, it has been contended, in pursu-

ance of the obvious intent of the legislature; and in support of the authority of the Court so to do, certain maxims, or rules for the construction of statutes, have been quoted and relied on. It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statute. So if it be within the reason of the statute.

Rules for the construction of penal statutes.

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in

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the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

The description of *place* contained in the 8th section of the act of 1790, c. 36., is not so incorporated into the 12th section, as to give the Courts of the Union jurisdiction of a manslaughter committed in a foreign river, and not on the high seas.

Having premised these general observations, the Court will proceed to the examination of the act, in order to determine whether the intention to incorporate the description of place contained in the 8th section, into the 12th, be so apparent as to justify the Court in so doing. It is contended, that throughout the act the description of one section is full, and is necessarily to be carried into all the other sections which relate to place, or to crime.

The 1st section defines the crime of treason, and declares, that if any person or persons owing allegiance to the United States of America shall levy war," &c. "such person or persons shall be adjudged guilty of treason," &c. The second section defines misprision of treason; and in the description of the

persons who may commit it, omits the words "owing allegiance to the United States," and uses without limitation, the general terms "any person or persons." Yet, it has been said, these general terms were obviously intended to be limited, and must be limited, by the words "owing allegiance to the United States," which are used in the preceding section.

It is admitted, that the general terms of the 2d section must be so limited; but it is not admitted, that the inference drawn from this circumstance, in favour of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. The words, therefore, "owing allegiance to the United States," in the first section, are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first. There is, too, in a penal statute, a difference between restraining general words, and enlarging particular words.

The crimes of murder and of manslaughter, it has been truly said, are kindred crimes; and there is much reason for supposing, that the legislature intended to make the same provision for the jurisdiction of its Courts, as to the place in which either might be committed. In illustration of this position, the 3d and 7th sections of the act have been cited.

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The 3d section describes the places in which murder on land may be committed, of which the Courts of the United States may take cognizance; and the 7th section describes, in precisely the same terms, the places on land, if manslaughter be committed in which, the offender may be prosecuted in the federal Courts.

It is true, that so far as respects *place*, the words of the 3d section concerning murder, are repeated in the 7th, and applied to manslaughter; but this circumstance suggests a very different inference from that which has been drawn from it. When the legislature is about to describe the places in which manslaughter, cognizable in the Courts of the United States, may be committed, no reference whatsoever is made to a prior section respecting murder; but the description is as full and ample, as if the prior section had not been in the act. This would rather justify the opinion, that in proceeding to manslaughter, the legislature did not mean to refer us to the section on murder for a description of the place in which the crime might be committed, but did mean to give us a full description in the section on that subject.

So, the 6th section, which punishes those who have knowledge of the commission of murder, or other felony, describes the places on land in which the murder is to be committed, to constitute the crime, with the same minuteness which had been before employed in the 3d, and was, afterwards, employed in the 7th section.

In the 8th section, the legislature takes up the sub-

ject of murder, and other felonies, committed on the water, and is full in the description of place. "If any person or persons, shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State, murder," &c.

The 9th section of the act applies to a citizen who shall commit any of the offences described in the 8th section, against the United States, or a citizen thereof, under colour of a commission from any foreign Prince or State.

It is observable, that this section, in its description of place, omits the words, "in any river, haven, basin, or bay," and uses the words "high seas" only. It has been argued, and, we admit, with great force, that in this section the legislature intended to take from a citizen offending against the United States, under colour of a commission from a foreign power, any pretence to protection from that commission; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offence, committed under colour of such commission, on the high seas, and on the waters of a foreign State, or of the United States, out of the jurisdiction of any particular State. This would unquestionably have been the operation of the section, had the words, "on the high seas," been omitted. Yet it would be carrying construction very far to strike out those words. Their whole effect is to limit the operation which the sentence would have without them; and it is making very free with legislative language, to declare them totally useless, when they are sensible, and are calculated to have a de-

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cided influence on the meaning of the clause. That case is not directly before us, and we may perhaps be relieved from ever deciding it. For the present purpose, it will be sufficient to say, that the determination of that question in the affirmative, would not, we think, be conclusive with respect to that now under consideration. The 9th section refers expressly, so far at least as respects piracy or robbery, to the 8th; and its whole language shows that its sole object is to render a citizen who offends against the United States or their citizens, under colour of a foreign commission, punishable in the same degree as if no such commission existed. The clearness with which this intent is manifested by the language of the whole section, might perhaps justify a latitude of construction which would not be allowable where the intent is less clearly manifested; where we are to be guided, not so much by the words in which the provision is made, as by our opinion of the reasonableness of making it.

But here, too, it cannot escape notice, that the legislature has not referred for a description of the place to the preceding section, but has inserted a description, and by that insertion has created the whole difficulty of the case.

The 10th section declares the punishment of accessories before the fact. It enacts, "that every person who shall either upon the land or the seas, knowingly and wittingly, aid and assist, procure, command, counsel, or advise any person or persons to do or commit any murder or robbery, or other piracy,

aforesaid, upon the seas, which shall affect the life of such persons, shall," &c.

Upon this section, also, as on the preceding, it has been argued, that the legislature cannot have intended to exclude from punishment those who shall be accessories before the fact to a murder or robbery committed "in a river, haven, basin, or bay, out of the jurisdiction of any State;" and now, as then, the argument has great weight. But it is again to be observed, that the legislature has not referred for a description of place to any previous parts of the law, but has inserted a description, and by so doing, has materially varied the obvious sense of the section. "Every person who shall, either upon the land or the seas, knowingly and wittingly aid," &c. The probability is, that the legislature designed to punish all persons amenable to their laws, who should, in any place, aid and assist, procure, command, counsel, or advise, any person or persons to commit any murder or piracy punishable under the act. And such would have been the operation of the sentence, had the words, "upon the land or the seas" been omitted. But the legislature has chosen to describe the place where the accessorial offence is to be committed, and has not referred to a description contained in any other part of the act. The words are, "upon the land or the seas." The Court cannot reject this description. If we might supply the words "river, haven," &c. because they are stated in the 8th section, must we supply "fort, arsenal," &c. which are used in the 3d section, describing the place in which murder may be committed on land? In doing so, we should

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probably defeat the will of the legislature. Yet if we depart from the description of place given in the section, in which Congress has obviously intended to describe it, for the purpose of annexing to the word "seas," the words "river, haven, basin, or bay," found in the 8th section, there would be at least some appearance of reason in the argument, which would require us to annex also to the word "land," the words "fort, arsenal," &c. found in the 3d section.

After describing the place in which the "aid, assistance, procurement, command, counsel, or advice," must be given, in order to give to the Courts of the United States jurisdiction over the offence, the legislature proceeds to describe the crime so to be commanded or procured, and the place in which such crime must be committed. The crime is, "any murder or robbery, or other piracy, aforesaid." The place is "upon the seas."

In this section, as in the preceding, had the words "upon the seas" been omitted, the construction would have been that which, according to the argument on the part of the United States, it ought now to be. But these words are sensible and are material. They constitute the description of place which the legislature has chosen to give us; and Courts cannot safely vary that description, without some sure guide to direct their way.

The observations made on this section apply so precisely to the 11th, that they need not be repeated.

The legal construction of those sections is doubtful, and the Court is not now, and may perhaps ne-

ver be, required to make it. It is sufficient to say, that should it even be such as the Attorney General contends it ought to be, the reasons in favour of that construction do not apply conclusively to the 12th section. They both contain a direct reference to the 8th section. They describe accessorial offences, which from their nature are more intimately connected with the principal offence, than distinct crimes are with each other.

The 12th section takes up the crime of manslaughter, which is not mentioned in the 8th; and, without any reference to the 8th, describes the place in which it must be committed, in order to give jurisdiction to the Courts of the United States. That place is "on the high seas." There is nothing in this section which can authorize the Court to take jurisdiction of manslaughter committed elsewhere.

To prove the connection between this section and the 8th, the attention of the Court has been directed to the other offences it recapitulates, which are said to be accessorial to those enumerated in the 8th. They are admitted to be accessorial; but the Court draws a different inference from this circumstance. Manslaughter is an independent crime distinct from murder, and the legislature annexes to the offence, a description of the place in which it must be committed in order to give the Court jurisdiction. The same section then proceeds to enumerate certain other crimes which are accessorial in their nature, without any description of places. To manslaughter, the principal crime, the right to punish which depends on the place in which it is committed, Congress has annexed a description of place. To the other crimes enu-

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merated in the same section, which are accessorial in their nature, and some of which at least may be committed any where, Congress has annexed no description of place. The conclusion seems irresistible, that Congress has not in this section inserted the limitation of place inadvertently; and the distinction which the legislature has taken, must of course be respected by the Court.

It is the object of the law, among other things, to punish murder and manslaughter, on land, in places within the jurisdiction of the United States; and also to punish murder and manslaughter, committed on the ocean. The two crimes of murder and manslaughter, when committed on land, are described in two distinct sections, as two distinct offences; and the description of place in the one section, is complete in itself, and makes no reference to the description of place in the other. The crimes of murder and manslaughter, when committed on water, are also described as two distinct offences, in two sections, each containing a description of the place in which the offence may be committed, without any reference in the one section to the other. That section which affixes the punishment to manslaughter on the seas, proceeds to describe other offences which are accessorial in their nature, without any limitation of place. In every section throughout the act, describing a crime, the right to punish which depends on place, and in some instances where the right of punishment does not depend upon place, the legislature has, without any reference to a preceding section, described the place in which it must be committed, in order to bring the offender within the act. This characteristic feature

of the law now to be expounded, deserves great consideration, and affords a powerful reason for restraining the Court from annexing to the description contained in one section, parts of the description contained in another. From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute.

After giving the subject an attentive consideration, we are unanimously of opinion, that the offence charged in this indictment is not cognizable in the Courts of the United States; which opinion is to be certified to the Circuit Court for the district of Pennsylvania.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court for the district of Pennsylvania, and on the question on which the Judges of that Court were divided, and was argued by counsel; on consideration whereof, the Court is of opinion, that manslaughter committed in a river such as the river Tigris is described

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to be, is not punishable by the laws of the United States, and that the Circuit Court of the United States, for the district of Pennsylvania, has no jurisdiction over the offence. All which is ordered to be certified to the Circuit Court of the United States for the district of Pennsylvania.[a]

a The Constitution of the United States declares, that the judicial power of the Union shall extend, (among other things,) "to all cases of *admiralty and maritime jurisdiction*;" and this Court has determined, that the power thus granted belongs exclusively to the Courts of the United States. (Martin v. Hunter, *ante*, vol. 1. p. 333. 337.) It is not the purpose of this note to consider what cases of a *civil* nature are properly included within the terms, "cases of admiralty and maritime jurisdiction." As to the *criminal* jurisdiction of the admiralty, there is no doubt that it is defined by local limits; and in order to ascertain these, it becomes necessary to inquire into the extent of the admiralty jurisdiction of England, from which ours was derived, as that was from the maritime States on the continent of Europe.

Both in England and the other countries of Europe, the Court of Admiralty is a branch which has sprung from that ancient and venerable stock, the office of *admiral*. The etymology of the word serves to indicate the origin of the office, and the time when it was introduced, at least under that name, into Europe. The word *admiral* or *ammiral*, is doubtless derived from the Arabic word *emir* or *amira*, signifying a general officer or commander in chief, *dominum vel præfectum*. (*Du Cange. Glossary. Verbo Admiralius.* In the time of the crusades, by means of which so many oriental usages were brought into the west of Europe, it was introduced into France as the title of a commander in chief, either of land or sea forces. Accordingly, we find that the office, with that title, was unknown until the third race of French kings, under Charles IV., about the end of the thirteenth century, and it appeared in England about the same period in the reign of Edward I. After the term thus came to be exclusively applied to the commander in

chief of naval forces in France, the station was filled with several illustrious characters, and in the scale of civil and military dignities ranked immediately after the office of constable. The person who filled this high station had jurisdiction by himself or his deputies, of all crimes and offences committed on the sea, its ports, harbours, and shores. (*Valin. Com. sur l'Ordon. l.* 1. *tit.* 2. *art.* 10. *De la Compétence.*)

In England, the office subsisted with the same title of high admiral, until the reign of Charles II., when it was filled by his brother, the Duke of York, (afterwards James II.) who being excluded from office as a Catholic by the test act in 1673, it was executed by commissioners, with the same power and authority as belonged to the Lord High Admiral: and since the accession of the house of Hanover, the office has also been vested in commissioners, who are styled the Lords Commissioners of the Admiralty. But the king is said still to hold, for certain purposes, the office of Lord High Admiral, though in a capacity distinguishable from his regal character; a distinction of practical importance in the law of prize, but immaterial to the present purpose. The judge of the High Court of Admiralty in England formerly held his place by patent from the Lord High Admiral, but since that office has only existed in contemplation of law, he holds it by direct commission from the crown. The ancient criminal jurisdiction of the Court was modified by the statute of the 28th of Henry VIII. c. 15. which enacted, that offences upon the seas, and in havens, rivers, &c. should be tried by the admiral or his deputy, and three or four more, among whom two common law judges are usually appointed, the judge of the High Court of Admiralty presiding. (2 *Bro. Civ. and Adm. Law*, 458.) In Scotland, the Court is held before the delegate of the High Admiral, who may also name other inferior local deputies, and who is declared to be the king's Justice General upon the seas, or fresh water within flood and mark, and in all harbours and creeks. (2 *Bro. Civ. and Adm. Law.* 30.)

This remarkable conformity between the origin, history, and nature of the Courts of Admiralty in France and Great Britain, renders it highly probable that their jurisdiction, both civil and criminal, however it may have been shifted from its ancient

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foundations, was originally the same; and this supposition derives additional strength from the manner in which the history of the two countries is blended together during the middle ages, and from the circumstance of both having derived their maritime institutions from the shores of the Mediterranean.

There appears to be no question, that the admiralty jurisdiction of England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers, and arms of the sea, as far as the tide ebbs and flows. This is established by the ancient inquisitions, the records of which still remain in the black book of the admiralty, and by the articles given in charge at the admiralty sessions, as early as the reign of Edward III. (*Clerk's Praxis. Roughton's articles, passim. Exton, c.* 11, 12, 13. *Selden, de Dom. Mar. l.* 2. *c.* 24. *p.* 209.) But Lord Coke, in 4 *Inst.* 135. *et seq.* after admitting, that the admiralty had jurisdiction of all things done upon the sea, endeavours to establish the doctrine, that the sea, *ex vi termini*, did not include any navigable waters within the body of any county of the realm; and for proof of this, he mainly relies on certain authorities in *Fitzherbert's Abridgment*, (*Avowry*, 192. *Corone*, 399.) which, when carefully considered, will not support his position. The hostility of Lord Coke to the admiralty, and indeed to every other jurisdiction rivalling the common law Courts, is well known; and Mr. Justice Buller has observed, that "with respect to what is said relative to the admiralty jurisdiction in 4 *Inst.* 135. that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction." All the authorities cited by Lord Coke, will be satisfactorily disposed of upon the supposition (which Lord Hale asserts to be the fact,) that before the thirty-fifth year of Edward III. the common law exercised, even upon the narrow seas, as well as in ports and havens within the ebb and flow of the tide, a *concurrent* jurisdiction with the admiralty. (2 *Hale's, P. C.* 13. *et seq.*) Neither does the case itself in *Fitz. Abr. Corone*, 399. 8 *Edw.* 2. warrant Lord Coke's assertion. Stanton, J. is there reported to have said, that it is not an arm of the sea where a man can see

what is done on the one side of the water and the other; and that the coroner, in such cases, shall exercise his jurisdiction there. This *dictum*, taken literally, cannot be considered as law, for in the year books (22 *Assisarum*, 93.) it is expressly held, that every water which flows and reflows, is called an arm of the sea, so far as it flows. "*Que chescun ewe, que flow et reflow, est appelle bras de mer cy tantaunt come el flowe.*" The same doctrine is quoted and confirmed by Lord Hale, who states, that the sea is either that which lies within the body of a county, or without; and that an arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, *is*, or at least *may be*, within the body of a county. (*Hale, De Jure Mar. c. 4. p. 10.*) So that there is the strongest reason to question Lord Coke's authority in this respect, and to adhere to the evidence furnished by the records of the admiralty, of its ancient jurisdiction in ports and havens within the ebb and flow of the tide.

How far this ancient jurisdiction has been altered by statutes, is another question. The statute 13 *Richard* II. *c.* 5. enacts, "that the admirals, and their deputies, shall not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward, (III.) grandfather of our Lord the King that now is." The statute 15 *Richard* II. *c.* 3. enacts, "that of all manner of contracts, pleas and quereles, and of all other things done, or arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied, by the laws of the land, and not before, or by the admiral, nor his lieutenants, in any wise. Nevertheless, of the death of a man, and of a maihem done in great ships, being hovering on the main stream of great rivers, only, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also, to

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arrest ships in the great flotes for the great voyages of the King, and of the realm; saving always to the King all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities, and boroughs, their liberties and franchises." The true limit of the admiralty jurisdiction under these statutes was long a subject of angry contention between the civilians and the common lawyers. But it is admitted on all sides, that on the main or high seas, (which, as Blackstone states, begin at the low water mark, (1 *Bl. Comm.* 110.) the admiralty has jurisdiction exclusive of the common law; and that, between high water mark and low water mark, where the sea ebbs and flows, (which is technically the shore of the sea, or *littus maris*,) (*Hale de Jure Mar. c. 4. p.* 12.) the common law and the admiralty have a divided empire (*divisum imperium*) or alternate jurisdiction, one upon the water when it is full sea, the other upon the land, when it is an ebb. (1 *Bl. Comm.* 110. *Constable's case*, 5 *Co. Rep.* 106, 107. Barber v. Whanton, 2 *Lord Raym.* 1152. 2 *East's P. C.* 803. 4 *Bl. Comm.* 268.) Upon the sea coast, therefore, it is incontestible, that the body of every county bordering on such coast, is bounded by the shore of the sea, and at no time extends below low water mark.

But what constitutes the boundary of counties bordering on arms of the sea, and navigable rivers, is a question concerning which great differences of opinion have been expressed. It has been strenuously insisted by the judges of the admiralty, that, notwithstanding the statutes of Richard, the admiralty still continues to possess jurisdiction in all ports, havens, and rivers, where the sea ebbs and flows, below the first bridges. (1 *Sir L. Jenkins' Life*, xcii. *Exton, b. 2. c. 3. et seq. Zouch*, 92.) And Sir Henry Spelman adopts the same opinion. (*Spelm. Reliq.* 226.) The ground of this opinion is, that the same rule exists at the common law in respect to the bounds of counties on navigable waters and arms of the sea as is applied by the same law to the sea coast, viz. that they are limited by the ebb and flow of the tide; and that the statute of Richard was in-

tended no further to restrict the admiralty, than as to crimes committed above the first bridges. (1 *Sir L. Jenkins' Life*, xcii. *Exton*, *c.* 10. to 20. *Zouch*, 92.) And it cannot be denied, that the agreement of the twelve judges in 1632, (cited at large, *ante*, *vol.* III. *p.* 365. Note *a.*) strongly countenances this pretension. In Rex v. Soleguard (*Andrew's Rep.* 231.) also, Sir Edmund Isham cited an opinion delivered as recently as 1713, on a reference to all the judges, in which ten of them (against Ward, C. B. and Gould, J.) held, "that the admiralty hath a jurisdiction in all great navigable rivers *from the bridges to the sea*." And in that case, the Court did not deny the jurisdiction, but founded their judgment upon a supposed concurrent jurisdiction of the common law. On the other hand, Lord Coke, principally on the authority of the two cases before cited, (4 *Inst.* 140. *Fitz. Abr. Avowry*, 192. and *Corone*, 399.) maintains that the bodies of counties comprehend all navigable waters where persons can see from one side to the other; or rather, as other authorities, with more accuracy, state it, the *point*, where a man standing on one side of the land, may see what is done on the other side. (*Hawkins' P. C. c.* 9. *s.* 14. 2 *East*, *P. C.* 804.) Lord Hale appears to speak with great doubt and hesitation on this subject, merely asserting that "an arm or branch of the sea, where a man may *reasonably* discern between shore and shore, *is*, or at least *may be*, within the body of a county." And it may fairly be inferred as well from this cautious expression, as from his commentary on the statute of the 28th *Hen.* VIII. *c.* 15. (2 *Hale's P. C.* 16, 17.) that Lord Hale was not satisfied with Lord Coke's exposition of the common law boundary of counties. The whole question, however, became in a great degree unimportant in England after the enactment of the statute of the 28 *Hen.* VIII. *c.* 15. which gave to the High Commission Court, (of which the admiral or his deputy is the presiding judge,) cognizance of "all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, *or in any other haven, river, creek, or place, where the admiral or admirals have, or pretend to have, jurisdiction.*" In the exposition of this statute, Lord Hale says, "this seems to me to extend to great rivers where the sea flows and reflows below

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maritime jurisdiction. (1 *Sir L. Jenkins' Life*, lxxii. xcv. *et seq.* 2 *Sir L. J. p.* 745. 746.) But it appears that the colonial Vice Admiralty Courts have uniformly exercised a jurisdiction over revenue cases upon their original inherent powers by virtue of their commissions, independent of any statute. (See a case cited in the Fabius, 6 *Rob.* 245.) Beside the restrictions contained in the statutes of 13 and 15 *Rich.* II. as to criminal jurisdiction, are purely arbitrary, and cannot be considered as declaratory of the pre-existing law. What reason is there why the Admiralty should have jurisdiction of homicide and mayhem in rivers, ports, and creeks of the sea, and not of other crimes in the same places? Such a limitation has no foundation in the ancient constitution of the Court, and never at any time existed independent of the statute. It is also a well established rule in the construction of English statutes, that they are not to be considered as extending to the colonies, unless included by express words, or by inevitable implication; (1 *Bl. Comm.* 107, 108.) and it cannot be pretended, that the colonies are within the purview or the words of the statutes of the 13 and 15 Richard II. Why, then, should they be considered as extending to the colonies, which did not then exist, any more than to Scotland, which was not then united to the crown, but in which country the Admiralty still retains its ancient jurisdiction undiminished?

The commissions issued by the crown to the Vice Admiralty Courts in the colonies, were entirely inconsistent with the limitations imposed upon the Admiralty in England. One of the latest, which is probably copied from the others, is that issued to the Governor of New Hampshire, in 6 Geo. III. It empowers him "to take cognizance of, and proceed in, all causes, civil and maritime, and in complaints, contracts, *offences or suspected offences*, *crimes*, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, inquiries, extortions, and demands, and all business, civil and maritime, whatsoever, &c. throughout all and every the *sea shores*, *public streams*, *ports*, *fresh waters*, *rivers*, *creeks*, *and arms*, *as well of the sea*, *as of the rivers and coasts*, whatsoever, of the province, &c. and territories dependent thereon, and *maritime ports*, whatsoever of the same, and thereto adjacent;" and in this commission

those places are referred to as within "our maritime jurisdiction." (De Lovio v. Boit, 2 *Gallis.* 470. *Note* 47.) It seems highly probable that the expression "maritime jurisdiction," in the constitution, was borrowed from the language of those commissions, and was introduced *ex abundanti cautelâ*, and superadded to the term "admiralty," in order to obviate any doubt as to the full extent of the authority meant to be conferred.

Indeed it has already been, in effect, decided by this Court, that the statutes of Richard are not in force in the United States, as limitations of the admiralty and maritime jurisdiction granted in the constitution. By the judiciary act of 1789, *c.* 20. *s.* 9. seizures under laws of impost, navigation, and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well as seizures on the high seas, are expressly included in the admiralty and maritime jurisdiction of the District Courts. It is evident that Congress could not give the District Courts, acting as Courts of Admiralty, cognizance of any causes which were not "of admiralty and maritime jurisdiction," within the true meaning of the constitution; because, it would deprive the parties of their constitutional right of trial by jury. The objection was, therefore, very early taken, that seizures in ports, and in such navigable waters, as above stated, were not causes of admiralty and maritime jurisdiction, because those places were not, according to the common law interpretation in England of the statutes of Richard II. within the jurisdiction of the admiralty. But this Court has repeatedly overruled the objection, (La Vengeance, 3 *Dall.* 297. The Sally, 2 *Cranch*, 406. The Betsey and Charlotte, 4 *Cranch*, 443. The Samuel, *Ante, vol.* I. *p.* 9. The Octavia, *Ib. p.* 20.) and thereby established the doctrine that the constitutional admiralty jurisdiction includes ports, arms, and creeks of the sea, as far as the tide ebbs and flows.

The learned reader will observe, that this position is not disturbed by the decision of this Court in the case in the text, (The U. S. v. Wiltberger,) or by that of the United States v. Bevans; (*Ante, vol.* III. *p.* 336. 387.) the only question in those cases being, not what was the constitutional authority of Congress, but how far it had been exercised; not what was the

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extent of the admiralty and maritime jurisdiction granted in the constitution, but how far it had been conferred by Congress upon any particular Court of the Union.

(Local Law.)

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Under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale, and of the deed made thereon, that every fact necessary to give the Court jurisdiction should appear upon the record.

Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such a possession cannot exist if the party having the better right takes actual possession in pursuance of his right.

One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied with any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession.

Feb. 10*th.*

THIS cause was argued by Mr. *Williams*[a] for the plaintiff in error, and by the *Attorney-General*, and Mr. *F. Jones*,[b] for the defendant.

a He cited 2 *Tenn. Rep.* 44. 218. 186. 365. 358. 242. 1 *Tenn. Rep.* 362. 467. 545. 1 *Hayw. Rep.* 24. 62. 65. 95. 2 *Hayw. Rep.* 80. 3 *Mass. Rep.* 379. 2 *Tidd's Pract.* 936. 2 *Binney*, 223. 329. 1 *Binney*, 40. 4 *Dall.* 226. 1 *Wash. Rep.* 313. 9 *Johns. Rep.* 58. 179.

b They cited 1 *Tenn. Rep.* 119. 126. 436. 2 *Tenn. Rep.* 40. 5 *Hayw. Rep.* 294. 1 *Hayw.* 176. 4 *Wheat.* 77.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court. This is an action of ejectment brought by the lessee of David Ross against Charles M'Clung, for 5,000 acres of land, lying in the district of East Tennessee.

At the trial of the cause, the plaintiff in the Court below gave in evidence two grants from the State of North Carolina, for the land in controversy, to Stockly Donalson and John Hackett, the one dated the 20th of September, 1787, and the other dated the 22d of February, 1795. He also gave in evidence a deed of conveyance of the said land, purporting to be from Stockly Donalson and John Hackett, dated the 29th of September, 1793, and registered in Hawkins county, Tennessee, on the 27th of December, 1793. The regular registration of this deed, so far as respected Stockly Donalson, was admitted by the defendant. Its registration as to John Hackett, was not admitted, and was proved only by the following endorsements.

"*December Sessions*, 1793.

This deed was proved in open Court, and ordered to record. Test. RICHARD MITCHELL, C. H. C.

This conveyance was registered 27th of December, 1793, in liber G. p. 127. in the register's office of Hawkins county. THOMAS JACKSON, C. R."

It is stated in the bill of exceptions, that the execution of the deed on the part of Hackett, was not proved.

The defendant also claimed under Stockly Donalson; but his deeds being of subsequent date, could confer no title while the deed to Ross remained in force.

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For the purpose of invalidating this deed, he offered in evidence certain records of the County Court of Rhea, showing that the land had been sold for the non-payment of taxes, had been conveyed by the sheriff to the purchaser, and by the purchaser to the defendant. The regularity of this sale, and the validity of the deeds made in consequence of it, were contested, and the Court determined against their validity; to which opinion of the Court the counsel for the defendant excepted.

In the year 1803, the legislature of Tennessee passed an act, subjecting all lands to which the Indian claim was extinguished, held by deed, &c. to taxes. The 13th section of the act provides, that "in case there shall not be any goods or chattels on which the sheriff can distress for public taxes, &c. he shall report the same to the Court of his county." The Court is then directed to make out certain lists, and to direct certain publications, after which the Court may enter up judgment, on which execution may issue, and the lands be sold. In 1807, the legislature passed a supplementary act, the 3d section of which enacts, that it shall be the duty of the collector of taxes in each county, after the 1st day of January in each year, to make report to the Court in writing, "of all such tracts or parts of tracts of land as have, from his own knowledge, or from the information of others, not been returned for taxation for the said preceding year; and it shall be the duty of the said Court to cause said report to be recorded in books to be kept for that purpose, and to cause judgment to be entered up for double the tax due on the

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said land, not returned for taxation, and so unpaid, and shall order the same to be sold," &c.

In January, 1810, Miller Francis, collector of taxes in Rhea county for the year 1809, reported to the Court, that the following lands were not listed for taxation for the year 1809, to wit, &c. Then follows a list of several tracts of land, among which is the tract in question, reported three several times in the following terms:

Reputed owners.	*Quantity.*	*No. of title.*	*Date of title.*	*Location.*	*Tax.*
Stockly Donalson,	5000	200	20 Sept. 1787.	Pleasant, &c.	
S. Donalson and John Hackett,	5000	1347	22 Feb. 1795.		
David Ross,	5000	200	20 Sept. 1787.		

Upon the return of which report the Court entered up a judgment for the sale of the said lands, and after the publication required by law, an execution was directed, under which the said land was sold as being three distinct tracts; when Robert Farquharson became the purchaser of the tracts reported to belong to Stockly Donalson, and to Stockly Donalson and John Hackett; and the agent of David Ross became the purchaser of the tract reported to belong to David Ross.

In the summary proceedings for the sale of lands in Tennessee, for the payment of taxes, every fact necessary to give jurisdiction to the Court, must appear in the record.

A question of considerable difficulty arises on the validity of these sales. Under the act of 1803, the power of the Court to render judgment in such cases for the sale of land, is founded on there being no personal property from which the tax might be made. The jurisdiction of the Court depends on that fact. Whether it is necessary that its existence should be shown in the judgment of the Court, is a question on which the State Courts appear to have decided differently at different times. But the last, and we

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believe, the correct opinion, reported in 5 *Haywood*, 394. establishes the general principle, that in these summary proceedings, every fact which is necessary to give jurisdiction, ought to appear in the record of the Court. The act of 1807 directs the Court to proceed on the return of the collector, that the taxes of the preceding year are unpaid, or that the land has not been returned for taxation. Whether this act, which is supplemental to that of 1803, authorizes the Court to give judgment for the sale of land, although there may be personal property in the county sufficient to pay the tax; or only varies the mode of proceeding against the land, without varying the circumstances under which it may become liable, is a question which does not appear to have been decided in Tennessee, and which it is unnecessary to decide in this case, because we are all of opinion, that if the sale was valid, Ross is to be considered as the purchaser of his own title, and Farquharson as the purchaser of the title of Donalson and Hackett. The objection to this is, that the agent of Ross stood by, and permitted Farquharson to bid. But this objection implies a knowledge on the part of Ross, or his agent, that the land sold in the name of Donalson and Hackett, was his land. There is no evidence that either of them possessed this knowledge; nor are the circumstances such as would justify its being presumed. Were the Court required to presume fraud on this occasion, it is not to Ross, or to his agent, that the evidence on this particular part of the transaction would justify us in ascribing it. We think, then, that the defendants in the Court be-

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low, acquired no title to Ross's land by the sheriff's sale or deeds. We think, then, that there was no error in rejecting these deeds.

The defendant, also, claimed the benefit of the act of limitations, which makes seven year's peaceable and adverse possession a complete bar to the action.[a]

Construction of the statute of limitations of Tennessee.

In support of this claim, he relied on the testimony of John Meriott, who swore, that in pursuance of an agreement between him and John Hackett, who informed him that the land belonged to him, Hackett,

a The statute of Tennessee of 1797, c. 47., made to settle the true construction of the statute of limitations of North Carolina of 1715, provides, "that in all cases, whenever any person, or persons, shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person or persons, so holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, such quantity of land as shall be specified in his, or their said grant, or deed of conveyance founded on a grant as aforesaid." The act then proceeds to bar the claim of those who shall neglect, for the term of seven years, to avail themselves of any title they may have.

Under the statute of North Carolina, it had been determined by the Courts of that State, that it afforded protection to those only who held by colour of title. And under the act of Tennessee, it is settled by the decisions of the local Courts, and of this Court, that it does not, like other statutes of limitation, protect a mere naked possession, but that its operation is to be limited to a possession of seven years, acquired and held under a grant or a deed founded on a grant. *Patton's Lessee* v. *Easton*, ante, vol. I. p. 476.

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and the defendant, M'Clung, he took possession of the land in March, 1807, built a house, and cleared seven or eight acres, and retained possession of the land until the contract was rescinded. By a contract with M'Clung, he agreed to hold possession for M'Clung and Hackett. It also appeared in evidence that Meriott remained in possession until the autumn of 1808, when he surrendered it to Hackett, who, in the succeeding spring, moved with his family into the house Meriott had built, where he resided until his death, since which event it has been occupied by his widow and family.

The plaintiff then proved, that in 1795, John Hackett showed this agent of Ross, the land in controversy as the land sold to him; that in the year 1813, the same agent agreed to lease a part of the land to one Cox, who, in pursuance of the said agreement entered thereon, and built a small house, but being threatened by M'Clung with a suit, he abandoned it.

Upon this testimony, the defendant in the Circuit Court moved the Court to charge the jury, 1st. That if they believed the possession taken by Meriott to have been on behalf of Hackett and M'Clung, and that Hackett continued said possession for himself and M'Clung, for seven years before suit, it was adverse, and would bar the claim of the lessor of the plaintiff. And farther, that the possession of the land taken by Cox, as tenant of Ross, would not suspend the statute of limitations, and that the effect of the said statute could be defeated only by suit at law.

This instruction the judge refused to give, but did

charge the jury that Hackett was by law a tenant in common with Ross, of which character he could not discharge himself by agreement with a younger purchaser from Donalson, and that the statute would not bar his right. With respect to the occupancy of Cox, the judge said, that merely going upon the land would not stop the running of the statute, but that if an older adverse claimant took actual possession by building houses, clearing land, &c. the operation of the statute of limitations might be thereby suspended. To this opinion, also, the counsel for the defendant excepted.

On examining the whole testimony stated in the bill of exceptions, it appears that the contract with Hackett, which is stated by Meriott in his deposition, was a contract for the sale and purchase of a part of the tract of 5,000 acres sold by Donalson to Ross, and that his contract with M'Clung was a sale of M'Clung's part of the same land, on condition that he would hold the whole tract for M'Clung and Hackett. The actual possession of Meriott, then, does not appear to have extended beyond his purchase. He does not allege that Hackett put him in possession of more land than was sold to him; nor does it appear that M'Clung put him in possession of any land farther than the virtual possession which was to be implied from the agreement which has been stated. The possession of Meriott, then, was an actual possession of a part of the land under a purchase. It was his own possession, in his own right; and not the possession of Hackett and M'Clung. His agreement with M'Clung to hold

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the residue of the land for Hackett and M'Clung, never having been followed, so far as is shown to the Court, by actual occupation of any part of that residue, cannot, we think, be construed into such a possession by Hackett and M'Clung as to affect the title of Ross. If the defendant cannot avail himself of the possession of Meriott, then it is not shown that the bar was complete when this suit was brought. The contract of sale with Meriott was rescinded in the autumn or winter of 1808, and Hackett entered into the land in the spring of 1809. This suit was instituted on the 27th of March, 1816. The testimony does not show that the entry of Hackett was anterior to the 27th of March, 1809. This, however, ought to be left to the jury. But the judge was of opinion that the possession of Hackett was not adverse to that of Ross, because they were tenants in common.

That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. The principles laid down in Barr v. Gratz, (4 *Wheat.* 213.) apply to this case.

Neither does it appear to this Court, that there is error in that part of the charge which respects the occupation of Cox on the part of Ross. It is, that merely going upon the land will not stop the running of the statute, but that if an older adverse claimant took actual possession by building houses, clearing

land, &c., the operation of the statute of limitations might be thereby suspended. It has been contended, that the statute of Tennessee can be stopped only by actual suit. This is true, when the possession is such as by its continuance to constitute a bar. But to make it such, it must be peaceable for seven years. This is the fact which creates the bar. This fact cannot exist, if the person having the better title takes actual possession in pursuance of his right. It is unnecessary to inquire whether the subsequent abandonment of this possession rendered it in this case a nullity, because the point is rendered unimportant by the circumstances that Ross and Hackett were tenants in common. There is, then, no error in the charge so far as respects the statute of limitations.

But the counsel also requested the judge to charge the jury, that the name of Hackett being signed to the deed from Stockly and Donalson to Ross, since the delivery of said deed, amounts to such an alteration or addition as will vitiate such deed, unless accounted for by the plaintiff. This charge, also, the judge refused to give, but did instruct the jury that the title was vested in Ross by the deed from Donalson, and could not be devested, although there might be an alteration or addition in a material part of the said deed, such as the name of Hackett being put to the deed and not proved.

Ground for reversing the judgment in this case.

There is some ambiguity in this instruction, and there is some doubt in the state of the fact. The counsel for the defendant assumes the fact, that the signature of Hackett was affixed to the deed after its

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delivery. This does not appear in the evidence as stated. Nor does it appear whether the signature of Hackett was affixed, before or after the deed was registered. It was not proved or registered as to Hackett, and is void as to him. The Court is not, however, prepared to say, that it is void as to Donalson. But the instruction given by the judge is in terms which might mislead the jury, and which appear in fact to have misled them. He says, that the title was vested in Ross by the deed from Donalson, and could not be devested by the addition of the name of Hackett. Now, this suit was instituted for the whole tract, and the title asserted by Ross was a title to the whole tract. The instruction of the judge might have been understood as informing the jury that the title vested by the deed conformed to the title claimed by Ross. In fact, it was so understood; for the jury found a verdict for the whole tract, and the Court gave its judgment for the whole. Now, Ross had no title to more than a moiety, and the judge ought so to have instructed the jury. For this reason, the judgment is to be reversed, and the cause remanded for a new trial.

Judgment reversed.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for East Tennessee, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that the Circuit Court erred in instructing the jury that the title to the whole tract of land in the proceedings mentioned, and for which judgment was

rendered in the said Circuit Court, was vested in David Ross, whereas the said Court ought to have instructed the jury that only a moiety of the said land was vested in him. It is, therefore, ADJUDGED and ORDERED, that the judgment of the said Circuit Court in this case be, and the same is, hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court with directions to issue a *venire facias de novo*.

(PRIZE.)

The VENUS, *Jademerowsky*, Claimant.

5 wh. 127
174 536

A question of proprietary interest, on farther proof. Restitution decreed.

Captors' costs and expenses ordered to be paid by the claimant, it being his fault that defective documents were put on board.

On farther proof, the affidavit of the claimant is indispensably necessary.

APPEAL from the Circuit Court of Georgia.

This cause was continued for farther proof at February term, 1816. (*Vide ante*, vol. I. p. 112.) Owing to various accidents, the farther proof was not received until the last term, and the cause was now argued upon the farther proof then produced and filed. It consisted of invoices of the cargo; bills of lading; accounts of sale; accounts of disbursements; the original correspondence between the

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claimant and Mr. Jones, his agent in London; and the original procuration from the claimant to Mr. Jones, recited in the power given from the latter to Diamond, the supercargo, one of the original papers found on board; to which was added, the affidavit of Mr. Jademerowsky, the claimant, verifying the correspondence, and explaining the circumstances of doubt and suspicion which appeared upon the original evidence.

Feb. 11*th.*

Mr. *Harper*, for the claimant, recapitulated the facts of the original case, stating that this ship sailed from London under Russian colours in April, 1814; joined a British convoy at Portsmouth, and sailed for Barbadoes, where she arrived, and having again sailed bound to the Havanna, was captured on the latter voyage by a British cruizer, carried in for adjudication, and acquitted. She changed her destination for Amelia island, and was captured by an American cruizer. At the hearing in the District Court, the ship was restored by consent, and the cargo acquitted; but the latter was condemned on appeal to the Circuit Court, the origin of the adventure not being traced farther than London, and it being supposed to be enemy's property concealed under a Russian garb. He argued from the farther proof, that all the circumstances of suspicion arising from the original evidence were now satisfactorily explained, and that consequently the claimant was entitled to restitution.

The *Attorney General*, contra, insisted, that the farther proof now produced was insufficient to satisfy

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the doubts originally existing in the cause. The ship was captured in the same year with the *St. Nicholas*[a] and the *Fortuna*,[b] and under circumstances strikingly similar. They were all sailing under Russian colours, and documented as Russian vessels; but exclusively directed by British merchants, professing to be the mere agents of the neutral claimants. Even some of the same parties also appear in this case; and the captors have a right to look into these other cases in order to bring this circumstance to the notice of the Court.[c] The documents now produced are not such, nor verified in such a manner, as the Court had a right to expect. It is not difficult to conceive what fate such documents would have experienced had they been offered in a similar case to Sir W. Scott, after the eloquent description he has given, in the case last cited,[d] of the inexhaustible ingenuity with which new arts are invented to cover enemys' property under a neutral garb; and the jealous rigour with which, in very suspicious cases, he examines the documents offered to his inspection. In another case, he says, "goods shipped in the enemy's country are to be considered *prima facie* as the property of the enemy, and can only be taken out of that presumption by fair and unbiassed evidence, and not from evidence supplied *only from the enemy.*"[e] But the greater part of the evidence in the

a 1 *Wheat.* 417. *b* 2 *Wheat.* 161.
c The Rosalie and Betsy, 2 *Rob* 231.
d Ib.
e The Juno, 1 *Rob.* 109.

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present case comes from that source, and is liable to that objection.

Mr. *D. B. Ogden*, for the claimant, in reply, argued, that as this Court, in granting the order for farther proof, had not stated what were the doubts to be explained by the claimant, it was sufficient if he had satisfactorily answered those suggested in the opinion of the Circuit Court. The claimant has given such an answer to those doubts, both by the production of documentary evidence, and by his own affidavit, which it is admitted, is indispensably necessary in order to guard against the inferences that might otherwise fairly be drawn from his silence. The documents are duly verified; and that not merely by his agents in the enemy's country, but by his own oath, and by other testimony.

Feb. 21st.

Mr. Justice JOHNSON delivered the opinion of the Court. When this case was first brought to the view of this Court, it was accompanied by some others, in which Russian claimants presented themselves under circumstances which satisfied this Court, that their claims were false and fraudulent. On comparing those cases with this, there was such a striking similitude in their machinery, that it was impossible not to suspect that they were all fashioned upon the same model, and adapted to the same end. With the St. Nicholas[a] and the Fortuna,[b] full in view, this Court could not adjudge the case of this vessel to be a case of restitution. Still, however, there was a possibility that those may have been the forged copies, and

Analogy between this case and the *St. Nicholas* and the *Fortuna*.

a 1 *Wheat.* 417. *b* 2 *Wheat.* 167.

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this the genuine prototype. This Court, therefore, trusting that a Russian character of high standing could not have pledged himself for the fairness of the transaction, but without better evidence than was then presented to our view, gave the most liberal indulgence for procuring evidence to support the claim. We now express our satisfaction in having done so; inasmuch as it has enabled an honest man both to save his property, and vindicate his reputation. And we cannot omit this opportunity to remark, how much it becomes the interest, as well as principles of the fair neutral, to discountenance the conduct of him who indulges himself in fraudulent practices. The claimant in this case had nearly fallen a sacrifice to the bad faith of some of his countrymen; a great loss from it he must unavoidably incur: For, this is one of those cases in which, by the course of the admiralty, we shall be obliged to throw the costs and expenses upon the claimant, although we decree restitution. It is altogether upon the evidence of Jones, and the test-affidavit of the claimant, introducing and verifying their original correspondence, that restitution is now decreed. Unsupported, and unexplained by the evidence introduced as further proof, the condemnation was unavoidable. It is, therefore, the claimant's misfortune, not that of the captors, that the agent Jones had furnished the vessel with the defective documents which accompanied her.

Captor's costs and expenses to be paid by the claimant.

Decree reversed.

* Decree. This cause came on to be heard on the transcript of the record of the Circuit Court for the

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district of Georgia, and on the farther proof exhibited in this cause, and was argued by counsel. On consideration whereof, it is DECREED and ORDERED, that the decree of the Circuit Court for the district of Georgia in this case, condemning the cargo of the ship Venus, be, and the same is, hereby reversed and annulled. And this Court, proceeding to pass such decree as the said Circuit Court should have passed, it is further DECREED and ORDERED, that the said cargo of the ship Venus be restored to the claimant; and it is further decreed, that the said claimant pay to the libellants the costs and expenses incurred in the prosecution of this suit.

5 wh 182
177 661

(PRIZE.)

The LONDON PACKET.—*Merino*, Claimant.

A question of proprietary interest on farther proof. Restitution decreed, with costs and expenses to be paid by the claimant.

In general, the circumstance of goods being found on board an enemy's ship raises a legal presumption that they are enemy's property.

THIS was the claim of a Spanish subject, to a parcel of hides laden on board of the London Packet, a British ship, at the port of Buenos Ayres, in South America, in the month of June, 1813. The London Packet, on her voyage to London, was captured by the private armed brig the Argus, and carried

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into Boston for adjudication. On being libelled in the District Court as prize of war, the consul of his Catholic Majesty filed a claim for the property in question in favour of Don Jeronimo Merino, a Spanish subject. The District Court condemned the vessel and the whole of the cargo, except these hides, which were restored to the claimant, the Court being satisfied there was not such proof of enemy's property therein, as to authorize a decree of condemnation. For the ship and residue of the cargo no claim was interposed. From this decree, as to the hides, there was an appeal by the captors to the Circuit Court, where the same was reversed. The Court, although it reversed the sentence which had been pronounced below, expressed its entire satisfaction as to the national character and domicil of the claimant, and that the hides had been originally shipped by him; but condemned the property, because, on the order for farther proof, no affidavit had been offered, either of the claimant or his confidential agent, or clerk, of his interest in the cargo at the time of the shipment. It was considered, that the absence of such a document, so universally expected and required by prize tribunals, unavoidably threw a suspicion over the cause, and being wholly unaccounted for, it authorized a belief that there had been a voluntary, if not a studied omission on the claimant's part. At the same term in which the sentence of reversal was pronounced, but not until after such sentence was known, the affidavit of the claimant, which had been received since the last adjournment of the Court, was produced by the Spanish Consul, with a petition

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that the decree might be rescinded, for the purpose of admitting it into the case, or that the same might be so far opened, for the consideration of the Court, as to make the affidavit of Merino a part of the evidence therein, so as to accompany the other testimony in the appeal to this Court. Upon this application the Circuit Court ordered, that the affidavit should be received by the clerk, and sent up with the other papers *de bene esse*, subject to the directions of this Court. The affidavit had been taken on an order below for farther proof, but had not been received, as has been stated, when the decree of condemnation was pronounced.[a]

Mr. *Webster* and Mr. *Pitman*, for the captors, argued, that it was a well-settled principle in the Prize Court, that the *onus probandi*, lies on the claimant. "In the Prize Court," says Sir Wm. Scott, "where special reasons for deception are perpetually occurring, and where the Court exercises a much more unconfined jurisdiction on questions of property than it exercises in its civil forum, proof of property lies generally on the claimant, and he may be called upon to support the *prima facie* evidence of a good title which is already exhibited."[b] This burden would have rested on the claimant in the present case if the goods in question had been found on board of a *neutral* ship; but it is increased by the fact that the property was found on board an *enemy's* ship, and an enemy's

a *Vide* S. C. 1 *Mason's Rep.* 14. *Ante, vol.* II. 371.

b The Countess of Lauderdale, 4 *Rob.* 234.

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armed ship. The maxim as laid down by Grotius, is: "*Res hostium navibus presumuntur esse hostium, donec contrarium probetur.*" A presumption which, nevertheless, may be destroyed by *strong proofs* to the contrary.[a] In this case, the property was not only found on board an enemy's armed ship, but was unaccompanied by the documentary evidence required to prove its neutrality. No papers were found at the time of capture relating to the cargo, except the bills of lading; and all the letters and invoices were sunk by the order of the master of the London Packet, in the letter bag, as sworn by two of the crew upon their examination on the standing interrogatories. The spoliation of papers, is, therefore, superadded to the fact of the property being found on board a ship of the enemy, destined to an enemy's port; and the claimant is called upon to produce the strongest, and most satisfactory proof to destroy the many presumptions arising from these facts, that, in truth, the property belongs to the enemy. The claimant has had abundant opportunity afforded him to produce this proof. The first order for further proof was made in the District Court the 26th of November, 1813, and the claimant was indulged until nearly the close of the year 1815, in the Courts below, to establish the verity of his claim. Having failed so to do, this Court afforded him further time, and he has had from February, 1816, until this term, a period of four years, to produce plenary proof in

a *De Jure Belli ac Pac. b.* 3. *c.* 6. *s.* 6. *Bynk. Q. J. Pub. l.* 1. *c.* 13. *Loccenius, l.* 2. *c.* 4. *n.* 11.

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reference to a claim so much indulged, and surrounded with so many circumstances of suspicion. If the claimant has failed to produce this proof, the presumption is irresistible, that his claim must be false. In such a suspicious case too, something more is to be expected from the claimant himself, than a mere test affidavit,[a] which is all the evidence (coming from himself) which the claimant has yet furnished.

Mr. *D. B. Ogden* and Mr. *Winder*, contra, admitted the rule of the Prize Court, that property found on board an enemy's vessel is presumed to be enemy's property: but, for this very reason, they insisted, such a vessel would seldom be made the vehicle of enemy's property intended to be covered as neutral. The records of the Court would show that in a great majority of the cases, where attempts have been made to disguise enemy's property, such attempts have been made by lading the goods on board a neutral vessel, in order to avoid that suspicion on which the rule of law is founded. But in this case, the presumption itself can have but little weight; because it appears in evidence that the claimant was compelled, by necessity, to lade his goods on board an enemy's vessel, there being, at that time none but British ships, at Buenos Ayres, destined for Europe, for which market his goods were intended. Some indulgence is due to the subjects of neutral States, who not having sufficient shipping of their own to carry on their trade, are compelled to resort to the navigation of other coun-

[a] The Magnus, 1 *Rob.* 31.

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tries, which may happen to be belligerent. Nor can the circumstance of a spoliation of papers by the enemy master have any unfavourable effect upon the claim of a neutral shipper conducting *bona fide*.[a] Even the actual resistance of the enemy master will not preclude the neutral shipper from receiving restitution, unless he participates in such resistance, and thus forfeits the privileges of his neutral character.[b] The counsel on both sides also argued upon the facts, with great minuteness and ability.

Feb. 20th.

Mr. Justice LIVINGSTON delivered the opinion of the Court. In the argument of this cause, the counsel have not confined themselves to the effect which the affidavit of the claimant ought of itself to have upon the decision of it, but have animadverted on all the testimony below. The Court has, therefore, also extended its examination to all the proofs in the cause, and will now pronounce its judgment on them.

Presumption arising from the fact of the goods being found on board an enemy's vessel.

The captured vessel was confessedly British property, as well as a great part of its cargo, and its destination was to a port in the enemy's country, which raises a legal presumption, that the property claimed was not neutral. It is not denied, that a neutral may use the vessel of a belligerent, for the transportation of his goods, and whatever presumption may arise from the circumstance, that it is not of itself a cause of condemnation. In this case, it does not appear, nor was it probably the fact, that any neutral vessel

a The Friendschaft, 3 *Wheat.* 14. 48.
b The Nereide, 9 *Cranch*, 388. 423.

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bound to London, was then at Buenos Ayres, and, therefore, this presumption ought to have but little influence on the present decision. If the proprietary interest be satisfactorily made out, the claimant is entitled to restitution.

There was no letter found on board from Merino to his correspondent in London, nor any invoice of this property. The only document relating to it was a bill of lading in Spanish, dated the 19th of June, 1813, purporting that 6,276 hides had been shipped on board the London Packet, by Jeronimo Merino, on his account and risk, to be delivered to Antonio Daubana, or in his absence to William Heiland, they paying the freight therein stipulated. This bill of lading was not signed by the master. To the omission of a signature to this bill of lading, much importance cannot be attached. It was found in possession of the master, and serving only as a memorandum for him of the cargo on board; and not being intended to pass into the hands of any other persons, it was a matter of indifference whether he put his name to it, or not. Of seven bills of lading which were found on board, no less than three were without his signature. Those which were delivered to the shippers, were, no doubt, signed, which was all that was necessary for their security. If this bill of lading be compared with the one produced, and proved by Daubana, it is impossible not to be struck with the exact similarity between them. They correspond in all respects, excepting only that one has not the signature of the captain, and appears most manifestly to have been filled up with the same ink, and in the

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same hand-writing, and at the same time; which is no small proof of their being cotemporaneous acts, and of the authenticity of the one which is now produced by the consignee. But no letter from Merino to his correspondent, nor any invoice, nor any bill of lading for the consignee, being found on board, it is urged, that the proof of proprietary interest is defective, and that the sentence of condemnation ought, therefore, to be affirmed. Had no farther proof been introduced, relieving the case from this difficulty, the argument would be entitled to great consideration. But the absence of those papers is now accounted for. It appears by the testimony of Stephenson, a passenger on board the London Packet, who was examined by the captors, that a large bag, containing a great number of private letters, and other papers, was sunk by order of the master of the London Packet, about half an hour before his vessel was taken. It is then but a fair presumption, that the letter, invoice, and bill of lading transmitted by Merino to his correspondent in London, were among the papers thus destroyed. The loss of these papers being thus accounted for, and the master of the captured ship not being brought in as he ought to have been, there was a propriety under the peculiar circumstances of this case, in affording, as the Court below did, an opportunity to the Spanish owner, of offering subsidiary proof respecting the property mentioned in the bill of lading found on board, and which was claimed by him. This farther proof, which consists of documents from the custom house at Buenos Ayres, of the positive testi-

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mony of Mr. Daubana, the consignee in London, and of the test-affidavit of Mr. Merino himself, is satisfactory, that the proprietary interest of these hides was, at the time of shipment and of capture, in the claimant. That they belonged to Smith notwithstanding the mark of S. on some of them, as has been suggested, cannot be believed. On that supposition, his conduct is utterly inexplicable. If the adventure was on his account, the disguise of the shipment could have been intended for no other purpose than to impose, as to them, on the Courts of the United States; for this contrivance or cover could not protect his vessel from capture and condemnation. Yet, if we believe some of the witnesses, Smith declared, that the whole of the cargo belonged to himself, and some merchants in London. These declarations of Smith, as he was set at liberty by the captain of the Argus, and, of course, not examined on the standing interrogatories, ought not to militate against the integrity of the present claim; but if they were really made, they afford strong evidence, that if this bill of lading were designed as a cover for belligerent property, some other person, and not Smith, was to be benefitted by it. For if he were the real owner, why, it may be asked, did he voluntarily abandon the property, (for he was put on board of another vessel, at his own request,) at the very moment when this fraud, if he ever intended to avail himself of it, was to be consummated? Why did he not remain in his vessel until her arrival in the United States, and apply to a Spanish Consul, or some other gentleman, to prefer a claim in favour of

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the pretended Spanish owner? Why did he not support this claim with his own oath, as he must have intended to do if he ever intended to derive any advantage from a contrivance which must have had its inception at Buenos Ayres, at his instigation, and for his emolument? There is no accounting for his conduct on any other hypothesis, than that he had no interest in this property, and was, therefore, willing to leave it to its fate.

The counsel for the captors, aware of the full and conclusive nature of the proof, so far as it establishes Merino's interest in the merchandize claimed by him, have endeavoured to show that Merino was not at Buenos Ayres when this shipment took place, and if he was, that it is impossible that his letter, which bears date the 10th of July, 1813, could have been put on board of the London Packet, which had sailed on the 24th of June, fourteen days before. If this be so, a gross attempt has been made to impose on the Court, which ought to be followed with consequences fatal to the present claim. But the Court is not of opinion that either of these suppositions is supported by the evidence. Not a single witness whose testimony is relied on to establish the fact of Merino's not being at Buenos Ayres at the time of the shipment, speaks with any certainty, or tells us affirmatively where he then was. This negative testimony, which, if it stood alone and uncontradicted, might excite a strong suspicion, is rendered of very little consequence, by much proof of a contrary character. The custom house document which has already been referred to, establishes the residence of

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Merino at Buenos Ayres at the date of the shipment; so does the affidavit of Merino himself, who is proved to be a gentleman of character, of property, and respectability. Daubana also swears to the same fact, with as much certainty as one correspondent can establish the domicil of another residing at so great a distance fro ı each other. He proves that Merino remained there until the 15th of August following, at least, that he received a letter from him, dated at Buenos Ayres, on that day. Another witness, who saw him at Rio Janeiro in the year 1814, says, that he did not leave Buenos Ayres until after the middle of the year 1813. The weight of testimony, therefore, may be considered as in favour of the claimant being at Buenos Ayres when this shipment was made. Nor is it so certain, as seemed to be taken for granted at the bar, that the London Packet sailed on her voyage for Europe on the 24th of June, 1813. It is true, that the cook, and some others who were examined *in preparatorio*, fix the time of her departure to that day; but the second mate, and only officer of the captured vessel who was examined, and who was most likely to know, says that she sailed in the month of July. Under this uncertainty respecting a fact which is deemed so material, and to which the claimant's attention has never been called, it cannot be expected that the Court should not only act upon it, as positively proved, but follow it up with the condemnation of property so clearly proved to belong to a neutral. It would be more charitable, and not unreasonable, even if the fact were proved, to presume that witnesses were speaking of the time

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of the London Packet's first weighing anchor at Buenos Ayres, and that she may for some reason or other have been detained in the river until the 10th of July, which is the date of Merino's first letter to his correspondent in London. It may be added, that it is not easy to believe, that if a fraud were intended, care would not have been taken to make the letter of advice, and all the other papers, correspond with the time of the departure of the vessel.

Restitution, with costs and expenses to be paid by the claimant.

Upon the whole, a majority of the judges are of opinion, that upon the farther proof the sentence of the Circuit Court should be reversed, and the property restored to the claimant. But as the captors have been put to great expense in consequence of the imperfect documents found on board, and the great delay which has attended the production of the farther proof, they are of opinion that their costs and expenses must be paid by the claimant.

Decree reversed.

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and the farther proof exhibited in this cause, and was argued by counsel. On consideration whereof, it is DECREED and ORDERED, that the Decree of the Circuit Court for the District of Massachusetts in this case, condemning six thousand two hundred and seventy-six ox hides, as good and lawful prize to the libellants, be and the same is hereby reversed and annulled. And this Court, proceeding to pass such

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Decree as the said Circuit Court should have passed, it is further DECREED and ORDERED, that the said six thousand two hundred and seventy-six ox hides, be restored to the claimant: And it is further DECREED, that the said Claimant pay to the Libellants the costs and expenses incurred in the prosecution of this suit.

The UNITED STATES v. KLINTOCK.

A commission issued by Aury, as "Brigadier of the Mexican republic," (a republic whose existence is unknown and unacknowledged,) or as "Generalissimo of the Floridas," (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea.

Quære—Whether a person acting with good faith under such a commission may be guilty of piracy?

However this may be, in general; under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy.

The act of the 30th of April, 1790, c. 36. s. 8. extends to all persons, on board all vessels, which throw off their national character by cruizing piratically, and committing piracy on other vessels.

THIS was an indictment in the Circuit Court of Virginia, against Ralph Klintock, a citizen of the United States, charging him with a piracy committed on the high seas, in April, 1818, on a vessel called the Norberg, belonging to persons to the jurors unknown. He was found guilty generally.

The facts stated were, that the prisoner is a citizen of the United States; that the vessel in which he sailed as first lieutenant was called the Young

Spartan; was owned without the United States, and cruized under a commission from Aury, styling himself Brigadier of the Mexican Republic and Generalissimo of the Floridas, granted at Fernandina, after the United States' government took possession of it. That he was convicted of a piracy, committed on the Norberg, a Danish vessel, in consequence of practising the following fraud upon her. The second officer of the privateer brought on board some Spanish papers, which he concealed in a locker, and then affected to have found them on board. The vessel was then taken possession of, the whole original ship's company left on an island on the coast of Cuba, and the second officer being put in command, took the name of the original captain, sailed for Savannah, and entered her there, personating the Danish captain and crew. The Young Spartan followed, and put into a port in the vicinity.

The counsel for the prisoner moved, that the judgment be arrested on the following grounds:

First, That Aury's commission exempts the prisoner from the charge of piracy.

Second, That the fraud practised on the Dane does not support the charge of piracy, as an act piratically done, and not in the exercise of belligerent rights.

Third, That the prisoner is not punishable under the provisions of the 8th section of the act of 1790.[a]

a Which provides, "That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or

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Fourth, That the act of the 30th of April, 1790, 8th section, "entitled an act for the punishment of certain crimes against the United States," does not extend to an American citizen entering on board of a foreign vessel, committing piracy upon a vessel exclusively owned by foreigners.

Upon these errors in arrest of judgment, the judges of the Circuit Court were divided in opinion, and directed the points, with their division thereon, to be certified to this Court.

Feb.14th.

The *Attorney General*, for the United States, argued, 1. That although the government and Courts of the United States had acknowledged the fact of the existence of the new States in Spanish America, so as to legitimate the war between them and the pa-

bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought."

rent country,[a] yet Mexico was not among the provinces in actual revolt, nor was any such State *de facto*, known to exist as the Mexican republic, under the authority of which the commission in question was issued. And even if there were such a power in existence exercising all the rights of war, Denmark is not at war with it, or with any other of the Spanish American provinces. 2. Although the fraud practised on the Dane, may not be in itself an act of piracy, yet the seizure was a piratical act, and the ingredient of fraud cannot change its character for the better. 3. Neither is the prisoner protected by the decision of this Court in the case of the United States v. Palmer.[b] That case merely decides, that the crime of robbery committed on board a ship belonging to subjects of a foreign power, by a foreigner, is not piracy, within the act of the 30th of April, 1790, c. 36. s. 8. But it does not decide, that the same offence, committed by a citizen, on board of a vessel not belonging to the subjects of any foreign power, is not piracy. The vessel on board of which the crime was committed, does not belong to any particular nation. A pirate, being *hostis humani generis*, is of no nation or State. He, and his confederates, and the vessel on board of which they sail, are outcasts from the society of nations. All the States of the world are engaged in a tacit alliance against them. An offence committed by them against

a The Divina Pastora, 4 *Wheat.* 52. 65. note *a*, and the cases there collected. The Estrella, *Ib.* 298. The Neustra Senora de la Caridad, *Ib.* 497.

b 3 *Wheat.* 610. 630.

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any individual nation, is an offence against all. It is punishable in the Courts of all. So, in the present case, the offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish.

Mr. *Winder*, contra, contended, that this case was decided by that of the United States v. Palmer. The only argument which can be urged for extracting this case out of that decision is, that the prisoner, in the present case, is a citizen of the United States, although the offence itself was committed on board of a foreign vessel. But the whole reasoning of the Court in Palmer's case, as well as the certificate of the judgment, shows, that in order to constitute the offences enumerated in the statute, it is indispensably necessary, not that the party should be a citizen, but that the vessel against which, and the vessel on board of which the offence is committed, should belong to citizens. It is insisted on the other side, that although the vessel now in question, does not belong to citizens of the United States, yet she does not belong to any particular foreign nation; and, therefore, does not fall within the letter of the authority referred to. But if by her not belonging to any particular foreign State, it be meant that she is a piratical vessel, then the case falls within the late act of 1819, providing for the punishment of piracy as defined by the law of nations, and not within the act of 1790. If it

falls within the act of 1790, then the act of 1819 is entirely superfluous. But that act was made to provide for the very defect in the former law which was for the first time discovered in the case of Palmer; and it is impossible, consistently with the authority of that case, to bring the present case within the statute, which was the only law in force, on the subject, at the time when this offence was committed.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court. The first and second points made by the counsel for the prisoner may be considered together.

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As judgment can be arrested only for errors apparent on the record, we should feel no difficulty in certifying our opinion of the insufficiency of these on that ground, were we not persuaded that from some inattention, the questions which arise properly on a motion for a new trial, have been stated by the clerk as a motion in arrest of judgment, and that the same points, if undecided now, will recur when judgment is about to be pronounced. In a criminal case especially, we think it proper to decide the question on its real, as well as technical merits.

So far as this Court can take any cognizance of that fact, Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea. Whether a person acting with good faith under such commission, may or may not, be guilty of piracy; we are all of opi-

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nion that the commission can be no justification of the fact stated in this case. The whole transaction taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practised on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction which has no tendency to mitigate the character of the offence.

The opinion of this Court in the case of the *U. States* v. *Palmer*, *ante*, *vol.* III. *p.* 610, commented on and explained.

The third and fourth errors assigned in arrest of judgment may also be considered together. The questions they suggest arise properly on the indictment, and require a reconsideration of the opinion given by the Court in Palmer's case.

The question propounded to the Court in that case was in these words: "Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel belonging exclusively to the subjects of any foreign State or sovereignty, or upon the person of any subject of any foreign State or sovereignty, not on board of any ship or vessel belonging to any subject or citizen of the United States, be a robbery or piracy within the true intent and meaning of the said 8th section of the act of Congress, aforesaid, and of which the Circuit Court of the United States hath cognizance, to hear, try, determine, and punish the same?"

The same question was again propounded, so varied only as to comprehend the offence if committed

by American citizens in a vessel belonging to foreigners.

The Court, in concluding its exposition of the act, thus sums up its opinion: "The Court is of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign State, on persons within a vessel belonging exclusively to subjects of a foreign State, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." The certificate of the Court conforms entirely to this opinion.

This opinion and certificate apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign State. It is, we think, the obvious import of these words, that, to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time, in point of fact, as well as right, the property of the subjects of a foreign State, who must have at the time, in virtue of this property, the control of the vessel. She must at the time be sailing under the flag of a foreign State, whose authority is acknowledged. This is the case which was presented to the Court; and this is the case which was decided. We are satisfied that it was properly decided.

But the reasoning which conducted the Court to this conclusion, is founded on sections of the act, the general words of which ought to be restricted to offences committed by persons who, at the time of

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committing them, were within the ordinary jurisdiction of the United States; and the language employed may well be understood to indicate an opinion that the whole act must be limited in its operation to offences committed by, or upon, the citizens of the United States. Upon the most deliberate reconsideration of that subject, the Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by perons who by common consent are equally amenable to the laws of all nations.

CERTIFICATE.—This cause came on to be heard on the transcript of the record from the Circuit Court

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for the District of Georgia, and was argued by counsel. On consideration whereof, this Court is of opinion:

1st. That Aury's commission does not exempt the prisoner from the charge of piracy.

2d. That although the fraud practised on the Dane may not in itself support the charge of piracy, the whole transaction, as stated in the indictment and in the facts inserted in the record, does amount to piracy.

3d. That the prisoner is punishable under the provisions of the 8th section of the act of 1790.

4th. That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruizing piratically and committing piracy on other vessels.

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The act of the 3d of March, 1819, c. 76. s. 5. referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime.

The crime of piracy is defined by the law of nations with reasonable certainty.

Robbery, or forcible depredation, upon the sea, *animo furandi*, is piracy by the law of nations, and by the act of Congress.

THIS was an indictment for piracy against the prisoner Thomas Smith, before the Circuit Court of

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Virginia, on the act of Congress, of the 3d of March, 1819, c. 76.[a]

The jury found a special verdict as follows: "We, of the jury, find, that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called the Creollo, (commissioned by the government of Buenos Ayres, a colony then at war with Spain,) and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta, seized by violence a vessel called the Irresistible, a private armed vessel, lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the Irresistible, appointed their officers, proceeded to sea on a cruize, without any documents or commission whatever; and while on that cruize, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled, 'An act to protect the commerce of the

a Which provides, (s. 5.) "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the District into which he or they may be brought, or in which he or they shall be found, be punished with death."

United States, and punish the crime of piracy,' then we find the said prisoner guilty; if the plunder and robbery, above stated, be not piracy under the said act of Congress, then we find him, not guilty."

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The Circuit Court divided on the question, whether this be piracy as defined by the law of nations, so as to be punishable under the act of Congress, of the 3d of March, 1819, and thereupon the question was certified to this Court for its decision.

Feb. 21st.

The *Attorney General*, for the United States, contended, that Congress, by referring to the law of nations for a definition of the crime of piracy, had duly exercised the power given them by the constitution, "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." By this reference they adopt the definition of the offence given by the writers on public law. All these writers concur in defining it to be, depredation on the seas, without the authority of a commission, or beyond its authority.[a] If there be any defect of precision or slight uncertainty in the definitions of the crime of piracy given by different writers on the law of nations, it is no more than what is to be found in common law writers on the crime of murder. Yet we are constantly referred

[a] *Grotius de J. B. ac. P. l. 2. c. 15. s. 5. Puffendorf, l. 2. c. 2. s. 10. Vattel, Droit des Gens, l. 3. c. 15. s. 226. Bynk. Q. J. Pub. l. 1. Duponceau's Trans. p. 127. Marten's Hist. of Privateers, p. 2. Horne's Transl. Molloy, b. 1. c. 4. s. 5. 2 Brq. Civ. and Adm. Law, 461. 2 Azuni, 351. Johns. Transl.* and the authorities there cited.

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by the legislature to the common law for the definition of murder and other felonies which are mentioned in statutory provisions. But there is no defect in the definition of piracy by the authorities to which we are referred by this act. The definition given by them is certain, consistent, and unanimous; and pirates being *hostes humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all. This renders it the more fit and proper that there should be a uniform rule as to the definition of the crime, which can only be drawn from the law of nations, as the only code universally known and recognized by the people of all countries.

Mr. *Webster*, contra, argued, that the special verdict did not contain sufficient facts to enable the Court to pronounce the prisoner guilty of the offence charged. The facts found, do not necessarily infer his guilt, but, on the contrary, are consistent with his innocence; inasmuch as it appears that he was one of the crew of a vessel belonging to Buenos Ayres, although not acting at the time when the supposed offence was committed under the commission of that colony, but acting as a non-commissioned captor, and as such, seizing the property of Spanish subjects on the high seas. But even supposing the offence to be well found by the special verdict, it cannot be punished under this act, because the law is not a constitutional exercise of the power of Congress to define the crime of piracy. Congress is bound to define it

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in terms, and is not at liberty to leave it to be ascertained by judicial interpretation. To refer to the law of nations for a definition of the crime, is not a definition; for the very thing to be ascertained by the definition, is the law of nations on the subject. The constitution evidently presupposes that this crime, and other offences committed on the high seas, were not defined with sufficient precision by the law of nations, or any other law, to form a rule of conduct; or it would merely have given Congress the power of punishing these offences, without also imposing upon it the duty of defining them. The writers on public law do not define the crime of piracy with precision and certainty. It was this very defect which rendered it necessary that Congress should define, in terms, before it proceeded to exercise the power of punishing the offence. Congress must define it as the constitution has defined treason, not by referring to the law of nations in one case, or to the common law in the other, but by giving a distinct, intelligible explanation of the nature of the offence in the act itself.

Feb. 25th.

Mr. Justice STORY delivered the opinion of the court. The act of Congress upon which this indictment is founded provides, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, &c. be punished with death."

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The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The constitution declares, that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the act of Congress of 1790, ch. 9. which declares, that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution.

In our judgment, the construction contended for proceeds upon too narrow a view of the language of the constitution. The power given to Congress is not merely "to define and punish piracies;" if it were, the words "to define," would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most muni-

cipal codes.[a] But the power is also given "to define and punish felonies on the high seas, and offences against the law of nations." The term "felonies," has been supposed in the same work, not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law.[b] Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

The crime of piracy is constitutionally defined by Congress, in an act referring to the law of nations for a definition of that crime.

But supposing Congress were bound in all the cases included in the clause under consideration to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offence. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is cer-

a *The Federalist, No.* 42. *p.* 276.

b See 3 *Inst.* 112. *Hawk. P. C. ch.* 37. *Moore,* 576.

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tain which is by necessary reference made certain. When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

Definition of piracy by the law of nations, and the act of Congress.

It is next to be considered, whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by ju-

dicial decisions recognising and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt.[a] The common law, too, recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII. ch. 15. piracy was punishable in England only in the admiralty as a civil law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence.[b] Sir Charles Hedges, in his charge at the Admiralty sessions, in the case of Rex v. Dawson, (5 *State Trials*,) declared in emphatic terms, that "piracy is

a Santerna, (*lib.* 4. *note* 50.) for instance, says, "Inter piratam et latronem, non sit alia differentia, nisi quia pirata depredator est in mari et potest dici fur et latro maris, quia latrocinium et furtum sicut fit in terra, sic fit in mari." And Emerigon, (1 *Emerig. Assur. ch.* 12. *s.* 29. *p.* 523.) "La piraterie est un brigandage sur mer. Le Brigandage, sur terre est appellé vol ou rapine." So Straccha "Piratae sunt latrones maritimi."

b *Hawk. P. C. ch.* 37. *s.* 2. 3 *Inst.* 112.

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only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy;" and he cited the civil law writers, in proof. And it is manifest from the language of Sir William Blackstone,[a] in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

The special verdict in this case contains sufficient facts upon which to pronounce the prisoner guilty of piracy.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the Court can pronounce that the

[a] 4 *Bl. Comm.* 73.

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prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the Circuit Court, that upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March, 1819.[a]

a To show that piracy is defined by the law of nations, the following citations are believed to be sufficient:

Grotius (*lib.* 3. *c.* 3. *s.* 1.) says, "Supra dicere incepimus justum bellum apud probos auctores dici saepe, nõn ex causa unde oritur, neque ut alias ex rerum gestarum magnitudine, sed ob peculiares quosdam juris effectus. Quale autem sit hoc bellum optime intelligitur ex hostium definitione apud Romanos jurisconsultos: *Hostes sunt, qui nobis, aut quibus nos publice bellum decernimus; cæteri* LATRONES *aut* PRÆDONES *sunt, ait Pomponius* (*Dig. Lib.* 50. *tit.* 16. *l.* 118.) *nec aliter Ulpianus,* (*Dig. lib.* 49. *tit.* 15. *l.* 24.) *hostes sunt, quibus bellum publiçe populus Romanus decrevit, vel ipsi populo Romano; cæteri* LATRUNCULI *vel* PRÆDONES *appellantur. Et ideo, qui à latronibus captus est servus latronum non est, nec postliminium illi, necessarium est. Ab hostibus autem captus; puta à Germanis et Parthis et servus est hostium, et postliminio statum pristinum recuperat. Et Paulus,* (*Dig. lib.* 49. *tit.* 15. *l.* 19. *s.* 2.) *A piratis aut latronibus capti liberi permanent. Accedat illud Ulpiani; in civilibus dissentionibus quamvis sæpe per eas respublica lædatur, non ta-*

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Mr. Justice LIVINGSTON dissented. In a case affecting life, no apology can be necessary for expres-

men in exitium reipublicæ contenditur : qui in alterutras partes discedent, vice hostium non sunt eorum, inter quos jura captivitatum aut postliminiorum fuerint ; et ideo captos, et venundatos, posteaque manumissos placuit supervacuo repetere a principe ingenuitatem, quam nulla captivitate amiserant. (*Dig. lib.* 49. *tit.* 15. *l.* 321. *s.* 2.")

Grotius adds, (*s.* 2.) " Illud tantum notandum, sub exemplo populi Romani quemvis intelligi, qui in civitate summum imperium habeat."

Again, he says, (*s.* 2.) " Non autem statim respublica aut civitas esse desinit, si quid admittat injustum, etiam communiter ; nec coetus PIRATARUM aut LATRONUM civitas est, etiamsi forte æqualitatem quandam inter se servent, sine qua nullus coetus posset consistere. Nam hi criminis causa sociantur ; illi etsi interdum delicto non vacant juris tamen fruendi causa sociati sunt, et exteris jus reddunt, si non per omnia secundum jus naturæ, quod multos apud populos ex parte quasi obliteratum alibi ostendimus, certe secundum pacta cum quibus que inita, aut secundum mores."

Again, he says, (*s.* 2.) " A latronibus captos capientium non fieri, supra dicentem audivimus Ulpianum. Idem captos à Germanos ait libertatem amittere. Atqui apud Germanos latrocinia, quæ extra civitatis cujusque fines fiebant, nullam habebant infamiam, quæ verba sunt Cæsaris, etc. Idem alibi Cattos nobilem Germaniæ populum latrocinia agitasse dicit. Apud eundem Garamantes latrociniis facunda gens ; sed gens tamen. Illyrici sine discrimine maris proedas agere soliti ; *de iis tamen triumphus fuit ; Pompeio de piratis non fuit. Tantum discrimen est inter populum quantumvis sceleratum et inter eos, qui, cum populus non sint, sceleris causa coïunt.*"

Again, he says, (*lib.* 3. *c.* 9. *s.* 16.) " Eae vexo res quæ intra presidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt, ex gentium jure. Et quæ *piratæ* aut *latrones* nobis eripuerunt non opus habent postliminis, ut Ulpianus et Javolenus

sing my dissent from the opinion which has just been delivered.

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responderunt; quia *jus gentium* illis non concessit ut jus domini mutare possint, &c. Itaque res ab illis captæ ubicunque reperiunter vindicari possunt, nisi quod ex naturali jure alibi censuimus ei qui suo sumtu possessionem rei adeptus est tantum esse reddendum, quantum dominus ipse ad rem recuperandam libenter impensurus fuerat."

And (*id. s.* 17.) "Potest tamen lege civili aliud constitui; sicuti lege Hispanica naves a piratis captæ eorum fiunt, qui eas eripiunt piratis; neque enim iniquum est, ut privata res publicæ utilitati cedat, presertim in tanta recuperandi difficultate. Sed lex talis non obstabit exteris, quo minus res suas vindicent."

Again; he says, (*lib.* 2. *c.* 17. *s.* 20.) "Ex neglectu tenuntur reges ac magistratus, qui ad inhibenda *latrocinia* et *piraticam* non adhibent ea quae possunt ac debent remedia; quo nomine damnati olim ab Amphictionibus Scyrii. Quae potestatem predarum in maris ex hoste agendarum per codicillos plurimis dedissent, et eorum nonnulli res amicorum rapuissent, desertaque patriae mari vagarentur ac ne revocati quidem redirent, an rectores eo nomine tenerentur, aut quod malorum hominum usiessent opera, aut quod cautionem non exigissent. Dixi eos in nihil amplius teneri, quam ut noxios, si reperiri possent, punirent, aut dederent; *praeterea in bona raptorum jus reddi curarent.*"

Again; he says, (*Id. c.* 18. *s.* 2, 3.) "*Piratae* et *latrones* qui civitatem non faciunt, *jure gentium* niti non possunt, &c. Sed interdum tales qui sunt jus legationis nanciscuntur fide data, ut olim fugitivi in saltu Pyrenaeo."

Again; (*lib.* 3. *c.* 13. *s.* 15.) "Repudiandus ergo Cicero (*De Offic. lib.* 3. *cap.* 29.) cum ait perjurium nullum esse predonibus pactum pro capite pretium non adservatur, nec si juratum quidem sit; quia *pirata* non sit ex perduellium numero desinitus, sed communis hostis omnium, eum quo nec fides esse debeat, nec jus jurandum commune, &c. Atque sicut in jure gentium constituto differe hostem a pirata verum est, et a nobis infra ostendetur; ita hic ea differentia locum habere non potest,

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The only question of any importance in this case is, whether the act of the 3d of March, 1819, be a

ubi, etsi personae jus deficiat cum Deo negotium est; qua de causa juramentum voti nomine nuncupatur. Neque id quod sumit Cicero verum est, nullum esse cum praedone juris societatem. Nam depositum ex ipso gentium jure reddendum latroni, si dominus non apparet recte Tryphonino responsum est."

These passages abundantly show the opinion of Grotius, that piracy by the law of nations is the same thing as piracy by the civil law; and though he no where defines the crime, in precise terms, yet there seems to be no doubt as to what he understood to be comprehended in that crime. *Piratae, latrones, praedones*, are used to denote the same class of offenders; the first term being generally applied to robbers or plunderers on the sea, and the others to robbers or plunderers on land.

The terms are, indeed, convertible in many instances in the civil law. Thus, in the title, De Lege Rhodia de Jactu, (*Dig. lib.* 14. *tit.* 2. *s.* 3.) it is said, "Si navis a *piratis* redempta sit, Servius, Osilius, Labeo, omnes conferre debere aiunt. Quod vero *praedones* abstulerint, cum perdere cujus fuerit, nec conferendum ei qui suas merces redimerit."

Bynkershoek, (*Quaest. Jur. Pub. lib. c.* 17.) treating on the subject of piracy, says, "interest scire qui *piratae* ac *latrones* sunt, nam ab his capta dominium non mutant neque adeo postliminio egent. Sic docet ratio; sic auctoritas juris in *l.* 19. *s.* 2. *l.* 24. and *l.* 27. de Capt. et Postlim. rev. (*Dig. lib.* 49. *tit.* 15.) et sic ex pactis quarandam gentium supra probavi. Non est igitur ut addam auctoritates *Grotii de Jure B. et. P. l.* 3. *c.* 9. *s.* 16. *Alberici Gentilis de jure belli lib.* 1. *c.* 4. *Zoucheii de Jure feciali, p.* 2. *s.* 8. *qu.* 15., aliorumque plurium in eandem sententiam. *Qui autem nullius principis auctoritate sive mari sive terra,* RAPIUNT, PIRATARUM PRAEDONUMQUE *vocabulo intelliguntur.*"

Azuni (*Part* 2. *c.* 5. *s.* 3.) says, "A pirate is one who roves the sea in an armed vessel without any commission or passport from any prince or sovereign state, solely on his own authority,

constitutional exercise of the power delegated to Congress of "defining and punishing piracies?"

and for the purpose of seizing by force, and appropriating to himself without discrimination, every vessel he may meet. For this reason pirates have always been compared to robbers. The only difference between them is, that the sea is the theatre of action for the one, and the land for the other." (*s.* 11.) "Thus, as pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is every where punished with death. As they form no national body, as they have no right to arm, nor make war, and on account of their indiscriminate plunder of all vessels are considered only as public robbers, every nation has a right to pursue, and exterminate them, without any declaration of war. For these reasons it is lawful to arrest them, in order that they may undergo the punishment merited by their crimes." (*s.* 12.) "Pirates having no right to make conquests, cannot, therefore, acquire any lawful property in what they take; for the law of nations does not authorize them to deprive the true owner of his property, who always retains the right of reclaiming it wherever it may be found. Thus, by the principles of common law, as well as the law of nature, at whatever period, or in whatever manner, things taken by a pirate may be recovered, they return again to their former owners, who lose none of their rights by such unjust usurpation." (See *Azuni, part.* 2. *c.* 3. *art.* 3. *p.* 351. 361. *Mr. Johnson's translation.*)

Lord Bacon, in his dialogue *De Bello Sacro* says, "Indubitatum semper fuit, bellum contra *piratas* juste geri posse per nationem quamcumque, licet ab iis minime infestatam et læsam, &c. &c. Vera enim causa hujus rei haec est, quod *piratæ communes humani generis hostes sint*; quos idcirco omnibus nationibus persequi incumbit, non tam propter metus proprios quam *respectu fœderis inter homines sociales.* Sicut enim quædam sunt fœdera inscriptis et in tractatus redacta contra hostes particulares inita; ita naturalis et tacita confœderatio inter

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The act declares, that any person who shall commit on the high seas the crime of piracy as *defined by the*

omnes homines intercedit contra communes societatis humanæ hostes." (10 *Bac. Works*, 313, 314. *edit.* 1803.).

Martens, in his Essay on Privateers, Captures and Recaptures, (*c.* 1. *s.* 1.) says, " L'armateur differe du *Pirate*, (1.) Le premier est muni d'une commission ou de lettres de marque du souverain, dont le pirate est destitué. (2.) L'armateur suppose le cas d'une guerre, (ou du moins celui de represailles,) le pirate pille au sein de la paix comme au milieu de la guerre. (3.) L'armateur s'oblige d'observer les ordonnances et les instructions qui lui ont été données, et de n'attaquer qu'en consequence de celles ci de l'ennemi, et ceux des vaisseux neutres qui font un commerce illicite, le pirate pille indistinctement les vaisseaux de toutes les nations, sans observer même les loix de la guerre."

Rutherforth (*Inst. b.* 2. *c.* 9. *s.* 9. *p.* 481.) speaking with reference to the law of nations, says, " All wars of a nation against its external enemies are not public wars. To make a war a public one, both the contending parties must be public persons ; that is, it must be a war of one nation against another, &c. Where a nation makes war upon *pirates* or *other robbers*, though these are external enemies, the war will be a mixed one ; it is public on one side, because a nation or public person is one of the parties ; but it is private on the other side, because the parties on this side are private persons, who act together occasionally, and are not united into a civil society. A *band of robbers* or a *company of pirates* may in fact be united to one another by compact, &c. But they are still, by the law of nature, only a number of unconnected individuals ; and consequently, in the view of the law of nations they are not considered as a collective body or public person. For the compact by which they unite themselves is void, because the matter of it is unlawful, &c. &c. The common benefit which a *band of robbers* or a *company of pirates* propose to themselves consists in doing harm to the rest of mankind."

law of nations, shall be punished with death. The special power here given to define piracy, can be at-

Woodeson, (*Lect.* 34. *vol.* 2. 422.) treating on captures at sea, after stating that the law of nations is part of the laws of England, and that captures at sea may happen either by pirates, or by way of reprisal, or as prize of war, says, "*Piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or State.*" He then quotes the opinion of Sir Leoline Jenkins with approbation, that it is piracy, not only when a man robs without any commission at all, but when, having a commission, he despoils those with whom he is not warranted to fight or meddle, such as are de legantia vel amicitia of the prince or state which hath given him his commission. He then adds: "But according to the judgments of our domestic tribunals, a bare assault without taking or pillaging something away does not constitute the crime, though Molloy pretends, that by the law of nations it is otherwise. Yet it does not seem necessary that any person should be on board the pillaged vessel." "If these violations of property be perpetrated by any national authority, they are the commencement of a public war; if without that sanction, they are *acts of piracy.*" He then proceeds to state several cases which had arisen in the Admiralty of England, and sums up his remarks as follow: "The foregoing particulars are the more deserving of consideration, because it seems agreed that when a piratical taking is ascertained, it becomes a clear and indisputable consequence that there is no transmutation of property. No right to the spoil vests in the piratical captor; no right is derivable from them to any recaptors in prejudice of the original owners. These *piratical seizures* being wholly unauthorized, and highly criminal by *the law of nations*, there is no pretence for devesting the dominion of the former proprietor. This principle, therefore, 'a piratis et latronibus capta dominium non mutant,' is the received opinion of ancient civilians and more modern writers, on general jurisprudence. The same doctrine was maintained in our Courts of Common Law long antecedent to the great cultivation and improvements made in the science of the law of na-

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tributed to no other cause, than to the uncertainty which it was known existed on this subject in the

tions. And he remarks in a note, (*p.* 427. note a.) "I have looked into the indictment against Luke Ryan, tried at the Admiralty Sessions, March, 1782, for piracy, and who is alleged to have had a Dutch commission. He was indicted not *for piracy generally by the law of nations*, but for that, being a natural born subject, he piratically, &c. against the form of the statute." From the whole scope of Mr. Woodeson's observations on the subject of piracy, it is very clear that he considered piracy, as punishable by the law of the admiralty, to be no other than piracy by the law of nations. The definition of piracy, and Mr. Woodeson's comments are cited with approbation by Mr. Gwillim in his late edition of Bacon's Abridgment. (5 *Bac. Abr.* 310. *edit.* 1807. London.)

Burlamaqui (*Part.* 2. *c.* 7. *s.* 41.) says: "Lastly, as to the wars of *robbers and pirates*, if they do not produce the effects above-mentioned, (transmutation of property on capture,) nor give to those pirates a right of appropriating what they have taken, it is *because they are robbers and enemies of mankind*, and, consequently, persons whose acts of violence are manifestly unjust, which authorizes all nations to treat them as enemies."

Thus far, the authorities cited are such as profess to treat of piracy *in terms* according to the law of nations, the notion of which was manifestly derived from the civil law, "on which," as Sir William Scott observes, (The Maria, 1 *Rob.* 340.) "great part of the law of nations is founded." Indeed, in the law of England, it is treated altogether as a *civil law* offence, and referred to that law for its definition and punishment. Piracies and depredations at sea, are capital offences by the civil law. (5 *Bac. Abr. Piracy*, 311. *Edit. ubi supra*, 3 *Inst.* 112. *Hawk. P. C. c.* 37. 2 *East, P. C.* 796. 4 *Bl. Comm.* 72.) The commentaries of the common law writers on the subject of piracy will be more fully considered hereafter.

Let us now advert to the definitions of the civil law and maritime writers.

law of nations, and which it must have been the intention of the framers of the constitution to remove,

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In the Novels (*Nov.* 134. *tit.* 17. *c.* 13.) it is declared, "Pro *furto* autem nolumus omnino quodlibet membrum abscindi, aut mori; sed aliter eum castigari. *Fures* autem vocamus *qui occulte et sine armis* hujusmodi delinquunt. *Eos vero, qui violenter aggrediuntur aut cum armis aut sine armis in domibus aut itineribus* aut IN MARI *poenis eos legalibus subdi jubemus.*"

Calvinus, in his *Lexicon Juridicum*, says: "*Piratae* dicuntur *praedatores marini;* sic dicti vel a pirata, qui prius maria infestavit, vel a Graeco πειραω, id est, transeo, quod conspecta insula in illam transirent, jam praedaturi. Hinc piratica ars est, quam exercent." In the French *Code des Prises*, (*Edition of M. Dufriche Foulaines, Paris*, 1804, *tom.* 1. *p.* 6.) the editor says: "Le pirate est celui qui parcourt les mers avec une batiment armè sans commission ou patente d'aucune etat, dans la vue exclusive de s'àpproprier tous les navires *par la force.* La piraterie est un assassinat; *tout puissance doit faire arreter et juger* des pareils brigands, et en purger la terre." Emerigon (*Assur. tom.* 1. *c.* 12. *s.* 28. *p.* 523.) says: "Les Pirates sont ceux qui courent les mers sans commission d'aucun Prince ni Etat souverain pour *depreder* les vaisseaux qu'ils rencontrent." "Les Ennemis sont ceux, qui autorisés par un prince, on etat souverain font la guerre dans la forme établie par le droit des gens; au lieu que les Pirates sont de simples particuliers qui *depredent* le premier navire qu'ils recontrent." "Les hostilités se commettent de nation à nation; au lieu que la piraterie est un *brigandage qui s'exerce sur mer* par gens sans aveu, et *d'une maniere furtive.*" "Les pirates sont ennemis du genre humain." "La piraterie, on le *brigandage sur mer*, est un delit contre la loi universelle des societies," &c. And Emerigon fortifies his opinion on this subject, by citations from the civil law, from other maritime writers, and from Blackstone's Commentaries. It is plain, therefore, that he considered piracy as defined in the civil law, the maritime law, and the common law of England, as the same crime.

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by conferring on the national legislature the power which has been mentioned. It was well known to

Bouchard (cited in 1 *Emerigon, c.* 12. *s.* 28. *p.* 527.) " Les pirates n'ont pas le droit des armes. Ce sont des *voleurs* et assassins, qui ne forme pas un corps d'etat. Ennemis des toutes les nations contre lesquelles ils exercent indistinctement leurs brigandages, toutes les nations sont en droit de courir sus, et de les exterminer sans declaration de guerre."

M. Bonnemant, in his edition of the Chevalier De Habreu's treatise on maritime captures, (*edit.* 1802, *Paris, part.* 1. *c.* 1. *s.* 5. *p.* 15. *note*,) says, " les pirates sont ceux dont la navigation, les actions et les entreprises ne sont autorisées ni avoneés par aucune puissance, qui agissent sur la propriété publique et particulière contre le vœu de toutes les nations." And De Habreu himself (as translated by M. Bonnemant, *Part* 2. *c.* 6. *s.* 1. *p.* 100, 101.) says, " Selon la définition de la prise, il paroît que le droit d'armer en course n'appartient qu'à ceux qui sont ennemis autorisés, appellés, en Latin, *hostes*. D'ou il s'ensuit que les *brigands* et les *pirates* sont exclus de ce droit; qu'ils ne peuvent prétendre aux privilèges que les loix de la guerre accorde aux ennemis, et qu'au contraire ils méritent d'être punis rigoureusement comme les malfaiteurs, et qu'on est autorisé à se saisir de tous leurs biens." " De tous les tems les pirates ont été regardés comme des voleurs publics et des perturbateurs de la paix. C'est pour cela qu'il est libre à quiconque s'en saisit de leur ôter la vie sans se rendre coupable d'injustice. La prejudice qu'ils causent à la tranquillité publique, á la liberté du commerce, et à la sûreté de la navigation, a fait que toutes les nations se sont accordées à les poursuivre et à les punir avec la plus grande rigueur."

Ferriere (*Dict. du Droit. art. Pirates*) says, " Pirates sont des corsaires, ecumeurs de mer, qui font des courses sur mer sans aveu ni autorité du Prince ou du Souverain."

In the Encyclopedie des Sciences, &c. (*Edit.* 1765, *art. Pirate*,) it is said, " On donne ce nom (Pirate) à *des bandits*, qui

the members of the Federal Convention, that in treatises on the law of nations, or in some of them at

maitres d'une vaisseau vont *sur mer attaquer les vaisseaux* marchands pour *les piller et les voler.*"

Valin (*Traité des Prises, c. 3. s. 2. p. 29.*) says, " Or la peine des *pirates* ou *forbans* est celle du dernier supplice, suivant l'opinion commune ; parceque ce sont des ennemis declarés de la societé, *des violateurs* de la foi publique and *du droit des gens, des voleurs publiques à main armé et à force ouverte.*"

Straccha says, (*De Naut. Part. 3. n. 30.*) " Inter Piratam et Latronem nulla alia est differentia nisi quia *Pirata depraedator est in mari.*"

Casaregis (*Disc. 64. n. 4.*) says, " Proprie pirata ille discitur qui sine patentibus alicujus principis ex propria tantum et privata auctoritate per mare discurrit *depredendi causâ.*"

Dr. Brown (2 *Civ. and Adm. Law*, 461, 462.) says, " Piracy is *depredation* without authority from any Prince or State, or transgression of authority by *despoiling* beyond its warrant." " *Unlawful depredation* is of the essence of piracy."

Beawes (*Lex Mercatoria art. Piracy, p. 250.*) says, " A pirate is a *sea thief*, or an enemy of human kind, also aims at enriching himself by *marine robberies* committed either by force, fraud, or surprise, on merchants or other traders at sea."

Molloy (*b. 1. c. 4. s. 1.*) says, " A pirate is a *sea thief*, or hostis humani generis, who, for to enrich himself either by surprise, or open force, sets upon merchants or others trading at sea, ever spoiling their lading, if by possibility they can get the mastery."

Marshall (*Insur. c. 12. s. 11. p. 556.*) says, " The crime of piracy or *robbery on the high seas*, is an offence against the *universal law of society.*"

It is also said in 16 Viner's Abridgment, (*art. Pirate and Piracy, A. p. 556.*) and in Cowell's Interpreter, (*Pirate,*) " A pirate is now taken for one who maintains himself by *pillage and robbery at sea.*"

Comyn's (*Dig. Admiralty, E. 3.*) defines piracy thus : " Piracy is when a man commits *robbery upon the sea ;*" and he cites as authority, 3 *Inst.* 113. and 1 Sir *Leol. Jenk.* 94.

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least, definitions of piracy might be found; but it must have been as well known to them that there

Lord Coke says, (3 *Inst.* 113. *Co. Litt.* 391.) "This word pirate, in Latin, pirata, from the Greek word πειρατης, which again comes from πειραν a transcendo mare, of roving upon the sea; and, therefore, in English, is called a rover and *robber upon the sea.*"

Sir Leoline Jenkins, in his charge at the admiralty sessions in 1668, says: "You are, therefore, to inquire of *all pirates* and *sea rovers*, they are in the law *hostes humani generis*, enemies, not of one nation, or of one sort of people only, but of all mankind. They are outlawed as I may say, by the laws of all nations; that is, out of the protection of all princes, and of all laws whatsoever. Every body is commissioned, and is to be armed against them as rebels and traitors to subdue and root them out. That which is called *robbing upon the highway, the same being done upon the water, is called piracy.* Now, robbery as it is distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but, also, the putting me in fear by taking them by force and arms, out of my hands, or in my sight and presence. When this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy." *Vol.* 1. *p.* 86.

Again; in another charge, he says, (*vol.* 1. *p.* 94.) "The next sort of offences pointed at in the statute [28 Hen. VIII. ch. 15.] are robberies; and a robbery, when it is committed upon the sea, is what we call piracy. A robbery, when it is committed upon the land, does imply three things, 1. That there be a violent assault; 2. That a man's goods be actually taken from his person or possession; 3. That he who is despoiled be put in fear thereby. When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in fright by the assault, this is piracy; and he that does so is a pirate or a robber within the statute."

was not such a coincidence on this subject, as to render a reference to that code a desirable or safe mode

The statute of Henry VIII. here referred to, does not contain any description of piracy. Before that statute, piracy was only cognizable by the civil law in the Admiralty Court. But the statute gave the High Commission Court (created by that statute) jurisdiction of "all treasons, felonies, *robberies*, murders, and confederacies committed in, or on the sea," &c. The term *piracy* is not found in the statute, and it is only as a *robbery* upon the sea that the High Commission Court has jurisdiction of piracy. Sir Leoline Jenkins, therefore, refers to the civil law definition of the offence of *piracy*; for it is agreed on all sides, that the statute of Henry VIII. has not altered the nature of the offence. (See 1 *Hawk. P. C. b.* 1. *c.* 37.)

Targa (as I find him quoted by his Spanish translator, *Gison, Reflex. c.* 61. *De los Corsarios o Pyratas*, for the original is not before me) says, "Esta (depredacion) se comete de dos modos, o por causa de guerra declarada entre dos naciones, &c. o por modo *de hurto violento como Ladrones del Mar* y como *hacen los robos en terra los salteadores de caminos*; y esto se compuela con la authentica del Derecho Civil, (*a*) que distingue la pyraterıa del robo," &c. Again; "A los *pyratas* como tambien a los *salteadores de camino*, enemigos comunes, opresores de la libertad y comercio, y como a *violadores del derecho de las gentes*, puede qualquiera oponerse y los ministros y subditos del principe pueden perseguir los y prender los aunque sea fuera del dominio y se hayan refugiado a los estados confinantes, sin que per esso quede violada la jurisdiccion; y presas que sean, se pendran en poder de la justicia de aquel Principe en cuyo estado han sido cogidos." Again; "Y assi concluyo, diciendo, que deben todos guardarse en el mar de Pyratas, y en la tierra de Ladrones; y *todo aquel*, que en el mar, playa, puerto, ò otro seno de mar, ò rio navigable, *roba* ò *apresa*, ya sea amigo, esto es, enemigo no declarado, y tambien los paysanos, ò enemigos propriamente tales, ò con patente, estandarte, ò sin el, ò con *engano*, ò *fuerza*, *siempre es pyrata*."

a Dig. lib 49. *tit.* 15. *l.* 19. *s.* 2.

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of proceeding in a criminal, and especially in a capital case. If it had been intended to adopt the defi-

Citations from civilians and maritime writers to the same effect might be multiplied; but they would unnecessarily swell this note. It remains only to notice the doctrines which have been held by the tribunals of Great Britain, and asserted by her common law writers on the subject of piracy.

Hawkins (*P. C. b.* 1. *c.* 37.) says, "A pirate at the common law is a person who commits any of those acts of piracy, *robbery and depredation upon the high seas*, which, if committed upon land, would have amounted to felony there."

From the terms of this definition, (if it may be so called,) it might be supposed, that by piracy *at the common law*, something was meant peculiar to that law, and not piracy by the civil law, or the law of nations. But that was certainly not the meaning of the writer. For it is perfectly well settled, that piracy is no felony at common law, being *out of its jurisdiction;* and before the statute of 28 Henry VIII. c. 15. it was only punishable by the *civil law*. That statute, however, does not (as has been already stated) alter the nature of the offence in this respect; and, therefore, a pardon of all felonies generally, does not extend to it. (2 *East's P. C.* 796. 1 *Hawk. c.* 37. *s.* 6. 8. 10. 1 *Hale*, 354. 2 *Hale*, 18. 3 *Inst.* 112.) And it was also determined in Rex v. Morphes, (*Salk.* 85.) that "no attainder for piracy wrought corruption of blood, *for it was no offence at common law*. (2 *East's P. C.* 796. *Co. Litt.* 391. *a.*) The intention of Hawkins must have been to use the phrase "at the common law" in its most comprehensive sense; in which sense the *law of nations* itself is a part of the common law; since all offences against the law of nations are punishable by the criminal jurisprudence of England.

Blackstone, in the Commentaries, (4 *Comm.* 71. 73.) evidently proceeds upon this notion. He says, "The crime of piracy, or *robbery and depredation* upon the high seas, is an offence against the *universal law of society*, a pirate being, according to Sir Edward Coke, *hostis humani generis*." He goes on to re-

nition or definitions of this crime, so far as they were to be collected from the different commentators on

mark, that every community hath a right to punish it, for it is a war against all mankind. He then gives the definition of piracy by Hawkins, as the definition of the common law; and then states the several statutes made in England on the subject of piracy, concluding thus: "These are the principal cases in which the *statute* law of England interposes *to aid and enforce the law of nations as a part of the common law*, by inflicting an adequate punishment for offences against that universal law committed by private persons."

The state trials for piracy in the reign of William III. are entitled to great consideration, both from the eminent talents of the Judges who constituted the tribunal, and the universal approbation of the legal principles asserted by them. It is, also, worthy of remark, that in none of these indictments was there any averment that the prisoners were British subjects; and most of them were for piracies committed on foreign subjects and vessels. They were all framed as indictments at common law, or for general piracy, without reference to any British statute.

In Rex v. Dawson and others, (8 *William* III. 1696. 5 *State Trials*, 1 *edit.* 1742.) the Court was composed of Sir Charles Hedges, Judge of the High Court of Admiralty, (as President,) Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward, Mr. Justice Rookby, Mr. Justice Turton, Mr. Justice Eyre, Mr. Baron Powis, and Doctors Lane, King, and Cook, (Civilians.) Sir Charles Hedges delivered the charge to the grand jury, and among other things, directed them as follows: "Now piracy is only a *sea term* for robbery, *piracy being a robbery committed within the jurisdiction of the Admiralty*. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is *robbery and piracy*. If the mariners of a ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a fe-

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this code, with all the uncertainty and difficulty attending a research for that purpose, it might as well

lonious intention, in any place where the Lord Admiral hath, or pretends to have, jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear, by considering the end for which the fact is committed, and the end will be known, if the evidence show you what hath been done. The King of England hath not only an empire or sovereignty over the British seas for the punishment of piracy, *but in concurrence with other Princes and States, an undoubted jurisdiction and power in the most remote parts of the world. If any person, therefore, native or foreigner,* Christian or Infidel, Turk or Pagan, *with whose country we are in amity, trade or correspondence, shall be robbed or spoiled,* in the narrow or *other seas, whether the Mediterranean, Atlantic, or Southern, or any branches thereof, either on this or the other side of the line,* IT IS A PIRACY, *within the limits of your inquiry, and cognizable by this Court.*" It seems impossible to doubt, that Sir Charles Hedges here understood piracy to be punishable *by all nations,* as a crime *against the law of nations,* and that its true definition is the same in the civil and common law, as in the law of nations, viz. robbery upon the seas; and that, as such, it was punishable by the British Courts in virtue of their general concurrent jurisdiction on the seas.

In Rex v. Dawson and others, there were several indictments. 1. The first was for piracy in robbing and plundering the ship Gunsway, *belonging to the Great Mogul and his subjects,* in the Indian seas. 2. The second for piracy, in forcibly seizing and feloniously taking, stealing, and carrying away a merchant ship called the Charles 2d. *belonging to certain of his majesty's subjects unknown,* on the high seas, about three leagues from the Groyne in Spain. 3. The third was for piracy *on two Danish ships.* 4. The fourth for piracy *on a Moorish ship.* Dawson pleaded guilty; and the other prisoners not guilty, and were upon trial convicted, and all sentenced to death accordingly. It appeared in evidence that the prisoners were part of the crew of the Charles the 2d, and rose upon her near

at once have been adopted as a standard by the constitution itself. The object, therefore, of referring

the Groyne, and afterwards ran away with her, and committed the piracies. The Solicitor General, in stating the case to the jury, said, "They (the prisoners) are arraigned for a very high crime, a robbery upon the seas." "These are crimes *against the law of nations*, and worse than robbery on land." Lord Chief Justice Holt, in delivering the charge to the jury, said, "that there was a piracy committed on the ship Charles is most apparent by the evidence that hath been given; that is, a force was put upon the master, and some of the seamen on board her, who because they would not agree to go on a piratical expedition, had liberty to depart and be set ashore, &c. &c. So that I must tell you beyond all contradiction, the *force put upon the captain*, and taking away this ship, called the Charles 2d, is piracy."

On the trial of Kidd and others for piracy, &c. in 13th of William III. 1713, (5 *State Trials*, *edit.* 1742.) there were several indictments. 1. The first was against William Kidd for the murder of one W. Moore, on the high seas, near the coast of Malabar, in a vessel called the Adventure Galley, of which Kidd was commander. 2. The second was against all the prisoners for piracy in seizing and running away with a certain merchant ship called the Quedash Merchant, then being *a ship of certain persons to the jurors unknown*, (not stated to be British subjects,) upon the high seas about ten leagues from Cutsheen in the East Indies. In fact, the vessel and cargo appeared by the evidence to belong to Armenian merchants, and then on a voyage from Bengal to Surat. Lord Chief Baron Ward, in charging the jury on this indictment, said, "the crime charged upon them (the prisoners) is *piracy*, that is, *seizing and taking this ship and the goods in it piratically and feloniously. This ship belonged to people in amity with the king of England.*" "If this was a capture on the high seas, and these were the goods of persons in amity with the king, and had no FRENCH PASS, then it is a plain piracy; and if you believe the witnesses, here is

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its definition to Congress was, and could have been no other than, to enable that body, to select from sources it might think proper, and then to declare, and with reasonable precision to define, what act or acts should constitute this crime; and having done

the taking of the goods and ship of persons in amity, and converting them to their own use. Such a taking as this would be *felony;* and *being at sea*, it *will be piracy.*" The prisoners were convicted and sentenced to death. There were four other indictments, three for piracy on Moorish ships, and one for piracy on a Portuguese ship; and all the prisoners were convicted and sentenced. Mr. Justice Turton in charging the jury on one of these indictments, said, "pirates are called hostes humani generis, the enemies to all mankind."

The case of Rex v. Green (4 *Anne*, 1704. 5 *State Trials*, 573. *edit.* 1742.) was a libel or indictment in the Court of Admiralty in Scotland for piracy, manifestly treated both in the libel and the arguments as a crime against the law of nations, and as such, also against the law of Scotland.

In Erskine's Institutes of the law of Scotland, in treating of the crime of piracy, the author says, "piracy is that particular kind of robbery which is committed on the seas." (*Ersk. Inst. b.* 4. *tit.* 4. *s.* 65.) He had in the preceding section, (64.) declared that, "robbery is truly a species of theft; for both are committed on the property of another, and with the same view of getting gain; but robbery is aggravated by the *violence* with which it is attended." The definition of both these crimes seems not at all different from that of the common law.

The foregoing collection of doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law, in the most ample manner confirms the opinion of the Court in the case in the text; and it is with great diffidence submitted to the learned reader to aid his future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy.

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so, to annex to it such punishment as might be thought proper. Such a mode of proceeding would be consonant with the universal practice in this country, and with those feelings of humanity which are ever opposed to the putting in jeopardy the life of a fellow-being, unless for the contravention of a rule which has been previously prescribed, and in language so plain and explicit as not to be misunderstood by any one. Can this be the case, or can a crime be said to be defined, even to a common intent, when those who are desirous of information on the subject are referred to a code, without knowing with any certainty, where it is to be found, and from which even those to whom it may be accessible, can with difficulty decide, in many cases, whether a particular act be piracy or not? Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain, that they do not all agree; and if they did, it would seem unreasonable to impose upon that class of men, who are the most liable to commit offences of this description, the task of looking beyond the written law of their own country for a definition of them. If in criminal cases every thing is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law

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of nations; but the objection to the reference in both cases is the same; that it is the duty of Congress to incorporate into their own statutes a definition in *terms*, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted. Nor does it make any difference in this case, that the law of nations forms part of the law of every civilized country. This may be the case to a certain extent; but as to criminal cases, and as to the offence of piracy in particular, the law of nations could not be supposed of itself to form a rule of action; and, therefore, a reference to it in this instance, must be regarded in the same light, as a reference to any other foreign code. But, it is said, that murder and robbery have been declared to be punishable by the laws of the United States, without any definition of what act or acts shall constitute either of these offences. This may be; but both murder and robbery, with arson, burglary, and some other crimes, are defined by writers on the common law, which is part of the law of every State in the Union, of which, for the most obvious reasons, no one is allowed to allege his ignorance in excuse for any crime he may commit. Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live; not so when acts which constitute a crime are to be collected from a variety of writers, either in different languages, or under the disadvantage of translations, and from a code with whose provisions even profes-

sional men are not always acquainted. By the same clause of the constitution, Congress have power to punish offences against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority, to declare, that all offences against the law of nations, without defining any one of them, should be punished with death. Such mode of legislation is but badly calculated to furnish that precise and accurate information in criminal cases, which it is the duty, and ought to be the object, of every legislature to impart.

Upon the whole, my opinion is, that there is not to be found in the act that definition of piracy which the constitution requires, and that, therefore, judgment on the special verdict ought to be rendered for the prisoner.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the district of Virginia, and on the question on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion, that the offence charged in the indictment in this case, and found by the jury to have been committed by the prisoner, amounts to the crime of piracy, as defined by the law of nations, so as to be punishable under the act of Congress, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy." All which is ordered to be certified to the Circuit Court for the district of Virginia.[a]

[a] *Vide* APPENDIX, Note IV. for the new act of Congress on the subject of piracy, passed May 15, 1820.

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42f 889
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5wh184
85f 141

(CONSTITUTIONAL LAW, and LAW OF NATIONS.)

The UNITED STATES v. FURLONG, *alias* HOBSON.
The UNITED STATES v. The SAME.
The UNITED STATES v. The SAME.
The UNITED STATES v. The SAME.
The UNITED STATES v. GRIFFEN and BRAILSFORD.
The UNITED STATES v. BOWERS and MATHEWS.
THE UNITED STATES v. The SAME.

The 8th section of the act of the 30th of April, 1790, c. 36. for the punishment of certain crimes against the United States, is not repealed by the act of the 3d March, 1819, c. 76. to protect the commerce of the United States, and punish the crime of piracy.

In an indictment for a piratical murder, (under the act of the 30th of April, 1790,) c. 36. s. 8. it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.

A citizen of the United States, fitting out a vessel in a port of the United States, in order to cruise against a power in amity with the United States, is not protected, by a commission from a belligerent, from punishment for any offence committed *against vessels of the United States.*

It is competent, in an indictment for piracy, for the jury to find, that a vessel within a marine league of the shore, at anchor, in an open road stead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon *the high seas.*

The words "out of the jurisdiction of any particular *State,*" in the act of the 30th April, 1790, c. 36. s. 8. must be construed to mean out of the jurisdiction of any particular State *of the Union.*

The act of the 3d of March, 1819, c. 76. s. 5. furnishes a sufficient definition of piracy; and it is defined to be *robbery on the seas.*

A vessel loses her national character by assuming a piratical character; and a piracy committed by a foreigner, from on board such a vessel, upon any other vessel whatever, is punishable under the 8th section of the act of the 30th of April, 1790, c. 36.

On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds, without the certificate of registry, or other documentary evidence, being produced, and without proof of their having been seen on board.

On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without evidence of her certificate of registry.

Each count in an indictment is a substantive charge; and if the finding of the jury conform to any one of the counts, which, in itself, will support the verdict, it is sufficient, and judgment may be given thereon.

THESE were several indictments in the Circuit Court of Georgia and South Carolina. The following are the cases as stated for the decision of this Court:

The UNITED STATES v. JOHN FURLONG, *alias* HOBSON.

THE prisoner was indicted before the Circuit Court of Georgia, for the piratical murder of Thomas Sunley, on the act of Congress of the 30th April, 1790, c. 36. Verdict, guilty. The offence was committed on a vessel and crew, all English. The person murdered was an English subject. The piratical vessel was a vessel of the United States, and run away with by the captain and crew. The prisoner is an Irishman, and a subject of the king of Great Britain. It was moved by the prisoner's counsel, that the judgment be arrested on the following grounds, viz.:

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1st. Because the indictment does not charge the prisoner as a citizen of the United States.

2d. Because the indictment does not charge the act, as committed on board of an American vessel, but charges it as committed on board of a foreign vessel, or vessel of owners unknown.

3d. Because the 8th section of the act of 30th April, 1790, c. 36. is virtually repealed by the act of 3d March, 1819, c. 76. to protect the commerce of the United States, and punish the crime of piracy.

Upon which grounds, the judges being divided in opinion, at the request of the counsel for the prisoner, it was ordered, that the indictment and proceedings thereon, together with the grounds of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the court, and sent to this Court, for their decision.

The UNITED STATES v. JOHN FURLONG, *alias* HOBSON.

THIS was another indictment against the same prisoner, before the same Court, on the act of Congress, of the 30th of April, 1790, c. 36. for the piratical murder of David May. Verdict, guilty. The same statement appears in the record, as in the case of the indictment of Furlong, for the murder of Thomas Sunley.

The UNITED STATES v. JOHN FURLONG, *alias* HOBSON.

THIS was another indictment against the same prisoner, before the same Court, on the act of the 3d of March, 1819, c. 76. for the piratical seizure of an unknown vessel. Verdict, guilty. The offence was committed on a foreign vessel, by a foreigner, from a vessel of the United States, which had been run away with by the captain and crew. It was moved by the prisoner's counsel, that the judgment be arrested on the ground that, as the constitution of the United States gives the power to Congress, to define and punish the crime of piracy, it is necessary that Congress define before it can punish, and that a reference to the law of nations is not such a definition as the constitution requires. Upon which ground, the Judges being divided in opinion, upon request of counsel for prisoner, it was ordered, that the indictment and proceedings thereon, together with the ground of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the Court, and sent to this Court for their decision.

The UNITED STATES v. JOHN FURLONG, *alias* HOBSON.

THIS was another indictment against the same prisoner, before the same Court, on the act of the 30th

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of April, 1790, c. 36. for a piratical robbery, committed on an American ship. Verdict, guilty. The offence was committed on a vessel of the United States, from a vessel of the United States, which had been run away with by the captain and crew. The prisoner is an English subject. It was moved by the prisoner's counsel, that the judgment be arrested, on the ground, that the 8th section of the act of 30th of April, 1790, c. 36. on which the indictment is founded, is virtually repealed by the act of the 3d of March, 1819, c. 76. entitled, "an act to protect the commerce of the United States, and punish the crime of piracy." Upon which ground the Judges being divided in opinion, upon the request of the counsel for the prisoner, it was ordered, that the indictment and proceedings thereon, together with the grounds of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the Court, and sent to this Court for their decision.

The UNITED STATES v. BENJAMIN BRAILSFORD and JAMES GRIFFEN.

THE prisoners were indicted before the Circuit Court of South Carolina, for piracy on an American ship, under the act of Congress of the 30th of April, 1790, c. 36. The Court divided on the following questions:

1st. Whether an American citizen, fitting out a vessel in an American port, really to cruize against a power at peace with the United States, is protected by a commission from a belligerent from punishment

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for any offence committed by him against vessels of the United States.

2d. Whether it is competent for a jury to find, that a vessel within a marine league of the shore, at anchor in an open roadstead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon the high seas.

3d. Whether the words, out of the jurisdiction of any particular State, in the 8th section of the act of Congress, of the 30th of April, 1790, c. 36. entitled, an act for the punishment of certain crimes against the United States, must be construed to mean, out of the jurisdiction of any particular State of the United States.

4th. Whether the said 8th section of the said act is virtually repealed by the 5th section of the act of Congress, of March 3d, 1819, c. 76.

5th. Whether the said 5th section of the said act of March 3d, 1819, c. 76. furnishes any, and what definition of the crime of piracy.

The United States v. David Bowers and Henry Mathews.

The prisoners were indicted before the Circuit Court of Georgia, under the act of 30th of April, 1790, c. 36. for a piratical robbery committed on an American ship. Verdict, guilty. The prisoners were part of the crew of the Louisa privateer, who rose upon their officers in October, 1818, and putting them out of the ship, proceeded on a piratical cruize. The Louisa was commissioned by the republic of

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Buenos Ayres, and commanded by Captain Almeida. There is no proof of her being American owned. The prisoners are American citizens, and the piracy for which they are convicted, was committed on the ship Asia, bearing the American flag. The captain asserted himself and vessel to be American; and on her stern was painted "New-York." The ship Asia, at the time of the robbery, was at anchor in an open roadstead, at the Island of Bonavista. The register of the ship Asia was not produced in evidence. Verdict, guilty.

The prisoner's counsel moved that the judgment be arrested on the following grounds, viz.

1st. That it is not competent to prove the national character of an American vessel, without evidence of her register.

2d. It is not competent for the jury to find that the piracy was committed on the high seas, when the evidence ascertained the Asia, at the time she was boarded, to have been at anchor in an open roadstead, at the island of Bonavista.

3d. That the prisoners are not punishable under the 8th section of the act of 30th of April, 1790, c. 36. entitled, "An act for the punishment of certain crimes against the United States;" the same having been virtually repealed by the act of 1819, c. 76. to protect the commerce of the United States, and to punish the crime of piracy.

4th. That there are two counts in the indictment, the first charging the offence to have been committed on the high seas, out of the jurisdiction of any particular State; the second, charging the offence to

have been committed in a certain haven, near the island of Bonavista, out of the jurisdiction of any particular State, and that it is not competent for a jury to find a general verdict of guilty on both counts.

Upon which grounds, the Judges being divided in opinion, it was ordered, that the indictment and proceedings thereon, together with the grounds of the motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the Court, and sent to this Court for their decision.

The United States v. David Bowers and Henry Mathews.

The prisoners were indicted before the Circuit Court of Georgia, under the act of the 30th of April, 1790, c. 36. for a piratical robbery committed on a ship, the property of British subjects, and called the Sir Thomas Hardy, upon the high seas. The prisoners were citizens of the United States, and part of the crew of the Louisa privateer, mentioned in the preceding case. The prisoners were found guilty, and their counsel moved that the judgment be arrested upon the following grounds, viz.:

1st. That the act of the 30th of April, 1790, c. 36. eighth section, does not extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States.

2d. That the eighth section of the act of the 30th

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of April, 1790, c. 36. entitled, "an act for the punishment of certain crimes against the United States," has been virtually repealed by the act of the 3d of March, 1819, c. 76. entitled, "an act to protect the commerce of the United States, and to punish the crime of piracy."

Upon which grounds, the Judges being divided in opinion, it was ordered, that the indictment and proceedings thereon, together with the grounds of the motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the Court, and sent to this Court for their decision.

Feb. 21*st.* These causes were argued by the *Attorney General* for the United States, and by Mr. *Webster* and Mr. *Winder*, for the prisoners.[a]

March 1*st.* Mr. Justice JOHNSON delivered the opinion of the Court. A variety of questions have been referred to this Court in these cases, and in the decisions to be certified to the Circuit Court, it will be necessary to notice each question in every case; but in the opinion now to be expressed, the whole may be considered in connexion, as they all depend upon the construction of the same laws.

A piracy committed from on board a vessel, which has thrown off her national character by cruizing piratically, is punishable under the act of 1790, c. 36., whatever might have been the original national character of such vessel.

In the two cases of Smith and Klintock, it has been already adjudged, that the 8th section of the act of 1790 was not repealed by the 5th section of that of 1819, and that the decision in Palmer's case does not apply to the case of a crew, whose conduct

a The substance of their arguments will be found in the preceding cases of the United States v. Klintock, *ante*, p. 144. and the United States v. Smith, *ante*, p. 153.

is such as to set at nought the idea of thus acting under allegiance to any acknowledged power. From which it follows, that when embarked on a piratical cruize, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.

This decision furnishes an answer to all those questions made in the above cases, which are founded on distinctions in the national character of the prisoner, or in that of the vessels, in relation to the piracies committed by the crew of the Louisa. The moment that ship was taken from her officers, and proceeded on a piratical cruize, the crew lost all claim to national character, and whether citizens or foreigners, became equally punishable under the act of 1790. It also furnishes an answer to all the exceptions taken in the case of piracy charged against Furlong. For whatever the Court might have thought on the effect of the act of 1819, he would have been still punishable under the act of 1790. The indictment against him is general, *against the form of the statute in such case made and provided*, and it matters not that his offence was committed subsequent to passing the act of 1819, since the other act still remains in force, and reaches his case.

It would seem to be unnecessary to go further in the cases against Furlong, as this conclusion decides his fate; but this Court cannot foresee how far it may be necessary to the administration of justice, against accessories or otherwise, that the question in the cases of murder should also be decided.

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construing it we should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning. As far as those powers extended, it is reasonable to conclude, that Congress intended to legislate, unless their express language shall preclude that conclusion.

It is true, that the 8th section declares murder as well as robbery to be piracy; but, in my view, if any thing is to be inferred from this association, it is only that they meant to assert the right of punishing murder to the same extent that they possessed the right of punishing piracy; which would be carrying the construction beyond what I contend for. The contrary conclusion, viz. that they meant to limit the cases of piracy made punishable under that act, to the cases in which they might, upon principle, punish murder, is rebutted by the generality of the terms used; and it would seem that, with this object in view, they ought to have taken the contrary course, and declared *piracy* to be *murder*.

It is obvious that the penman who drafted the section under consideration, acted from an indistinct view of the divisions of his subject. He has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy. But there exist well-known distinctions between the crimes of piracy and murder, both as to constituents and

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incidents. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State. Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right, much less an obligation. It is punishable under the laws of each State, and I am inclined to think that an acquittal in this case would not have been a good plea in a Court of Great Britain. Testing my construction of this section, therefore, by the rule that I have assumed, I am led to the conclusion, that it does not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. But otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress. As to our own citizens, I see no reason why they should be exempted from the operation of the laws of the country, even though in foreign service. Their subjection to those laws follows them every where; in our own Courts they are secured by the constitution from being twice put in jeopardy of life or member, and if they are also made amenable to the

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laws of another State, it is the result of their own act in subjecting themselves to those laws.

Nor is it any objection to this opinion, that the law declares murder to be *piracy*. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse; for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it: and this view of the subject appears to me to furnish the only sufficient key to the construction of the 8th section of the act of 1790.

As to piracy, since the decision that a vessel, by assuming a piratical character, is no longer included in the description of a foreign vessel, no case of difficulty can occur, unless the piracy be committed by the crew of a foreign vessel upon their own vessel, or by persons issuing immediately from shore. If

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such cases occur under the act of 1790, I shall respectfully solicit a revision of Palmer's case, if it be considered as including those cases. And shall do the same in the case of murder committed by an American in a foreign ship, if it ever occur; under the belief, that it never could have been the intention of Congress that such an offender should find this country a secure assylum to him.

There are a few minor points presented in these cases, which it is necessary to notice.

It was moved in favour of the prisoners, that the only legal testimony of the character of the ships plundered, must have relation to their register, or rather, to the documentary papers which establish their national character. But this we think wholly indefensible. It is obvious, that such testimony might be suppressed in various ways by the aggressors. Nor is it at all decisive of the real ownership of a vessel. Our laws recognize the possibility of the register's existing in the name of one, whilst the property is really in another person. The laws that require such documents to be on board a vessel, have relation to financial, commercial, or inter-national objects, but are not decisive or necessary in a prosecution for this offence. Property or character is a matter *in pais*, and so to be established. However, it is unnecessary to examine the question farther, as we have decided, that the national character of the vessels plundered was, in these cases, wholly immaterial to the crime.

It is not necessary to produce documentary evidence, in order to prove the national character of a vessel, on an indictment for piracy.

It was also moved, in two of the cases of piracy, that as the offences charged were committed on ves-

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sels then lying at anchor near the shore of the islands of Mayo and Bonavista, in a road, and within a marine league of the shore, the prisoners could not be convicted:

1. Because the words, "out of the jurisdiction of any particular State," in the 8th section of the act of 1790, includes foreign, as well as domestic States.

2. Because a vessel at anchor in a road, is not a vessel on the high seas, as charged in the indictment.

The words, "out of the jurisdiction of any particular State," in the act of 1790, c. 36, construed to refer only to a particular State *of the Union.*

On the first point, we think it obvious, that *out of any particular State*, must be construed to mean "*out of any one of the United States.*" By examining the context, it will be seen, that *particular State* is uniformly used in contradistinction to *United States.* For what reason, it is not easy to imagine; but it is obvious, that the only piracies omitted to be punished by that act, are land piracies, and piracies committed in our waters.

A vessel lying in an open roadstead of a foreign country, is "upon the high seas" within the act of 1790, c. 36, s. 8.

On the second point, we are of opinion, that a vessel in an open road may well be found by a jury to be on the seas. It is historically known, that in prosecuting trade with many places, vessels lie at anchor in open situations, (and especially where the trade winds blow) under the lee of the land. Such vessels are neither in a river, haven, basin or bay, and are no where, unless it be on the seas. Being at anchor is immaterial, for this might happen in a thousand places in the open ocean, as on the Banks of Newfoundland. Nor can it be objected that it was within the jurisdictional limits of a foreign State;

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for, those limits, though neutral to war, are not neutral to crimes.

It was also moved, in the same cases, that as there were two counts in the indictment, the one charging the offences as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty could not be sustained on account of repugnancy and inconsistency, as both facts could not be true. But, on this, it is only necessary to remark, that each count is a distinct substantive charge. Internal repugnancy in any one is a good exception, but *non constat* as to the whole, taken severally, but each may be for a distinct offence.

Each count in an indictment, is a distinct substantive charge; and if the verdict conform to any one of the counts, which in itself will support the verdict, it is sufficient.

There is, finally, another question certified to this Court, in one of the cases which arose under the captures made by the Louisa. It is, whether an American citizen, fitting out a vessel in an American port, really to cruize against a power at peace with the United States, is protected by a commission from a power belligerent as to the power against which he undertakes to cruize, from offences committed by him against the United States?

A citizen of the U. States, fitting out a vessel in a port of the United States, to cruize against a power in amity with the United States, is not protected by a foreign commission from punishment for any offence committed against vessels of the United States.

It will be seen, that the object of this question is to bring the whole crew of the Louisa under the immunities which it is supposed Almeida might have claimed by virtue of his commission. But, having decided that the vessel and crew had forfeited all pretensions to national or belligerent character, this question is anticipated. Yet, lest the ingenious views on this point, presented to the Court by one of the gentlemen who argued it, should tempt the unwary into practices that may be fatal to them, we think it

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proper to remark, that in Klintock's case it has been decided, that a belligerent character may be put off, and a piratical one assumed, even under the most unquestionable commission. And if the laws of the United States declare those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others, there can be no reason why such laws should not be enforced. For this purpose the 9th section of the act of 1790 appears to have been passed. And it would be difficult to induce this Court to render null the provisions of that clause, by deciding either that one who takes a commission under a foreign power, can no longer be deemed a citizen, or that all acts committed under such a commission, must be adjudged belligerent, and not piratical acts.

The UNITED STATES v. JOHN FURLONG, *alias* JOHN HOBSON.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the question on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion, that the 8th section of the act of the 30th of April, 1790, on which the indictment is founded, is not repealed by the act of the 3d of March, 1819, entitled, "an act to protect the commerce of the United States, and to punish the crime of piracy."

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The UNITED STATES v. JOHN FURLONG, *alias* JOHN HOBSON.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion, as to the first and second questions stated by said Circuit Court, that it was not necessary the indictment should charge the prisoner as a citizen of the United States, nor the crime as committed on board an American vessel, inasmuch as it charges it to have been committed from on board an American vessel, by a mariner sailing on board an American vessel. And as to the third question, That the act of the 30th of April, 1790, is not virtually repealed by the act of the 3d of March, 1819, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy."

The UNITED STATES v. GRIFFEN and BRAILSFORD.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of South Carolina, and on the questions on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court

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is of opinion, 1. That an American citizen fitting out a vessel in an American port, really to cruize against a power at peace with the United States, is not protected by a commission from a belligerent from punishment for any offence committed by him against vessels of the United States.

2. It is competent for a jury to find that a vessel within a marine league of the shore, at anchor in an open roadstead where vessels only ride under the shelter of the land, at a season when the course of the winds is invariable, is upon the high seas.

3. That the words, out of the jurisdiction of any particular State, in the 8th section of the act of Congress of the 30th of April, 1790, entitled, "an act for the punishment of certain crimes against the United States," must be construed to mean, out of the jurisdiction of any particular State of the United States.

4. That the 8th section of the act of the 30th of April, 1790, entitled, "an act for the punishment of certain crimes against the United States," is not repealed by the 8th section of the act of the 3d of March, 1819, entitled, "an act to protect the commerce of the United States, and to punish the crime of piracy."

5. That the 5th section of the act of the 3d of March, 1819, furnishes a sufficient definition of piracy, and that it is defined "robbery on the seas."

6. That considering this question, with reference to the case stated, the 8th section of the act of 1790 comprises the case of piracy committed by a foreigner in a foreign vessel upon any vessel, so as to

make him punishable with death, in as much as both vessel and crew no longer retained any pretention to national character after assuming that of a pirate.

7. That the national character of a vessel is a fact which a jury may find upon such evidence as will satisfy their minds, without production of the register, or proof of its having been on board of her.

8. That the 8th question is answered in the answer given to the fourth question.

The United States v. David Bowers and Henry Mathews.

Certificate.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the District of Georgia, and on the questions on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion, 1. That the act of the 30th of April, 1790, entitled, &c. section 8th, does extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States, in the case of these prisoners, in which it appears that the crew assumed the character of pirates, whereby they lost all claim to national character or protection.

2. That the 8th section of the act of the 30th of April, 1790, entitled, &c. has not been repealed by the 8th section of the act of March 3, 1819, entitled, &c.

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The UNITED STATES v. DAVID BOWERS and HENRY MATHEWS.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion,

1. That it is competent to prove the national character of an American vessel without evidence of her register.

2. That it is competent for the jury to find that the piracy was committed on the high seas, upon evidence that the Asia, at the time she was boarded, was at anchor in an open roadstead at the island of Bonavista.

3. That the 8th section of the act of the 30th of April, 1790, entitled, &c. is not repealed by the 8th section of the act of March 3, 1819, entitled, &c.

4. That each count in an indictment is a substantive charge, and if the finding conform to any one of them which in itself will support the verdict, it is sufficient to give judgment.

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(CHANCERY AND LOCAL LAW)

STEVENSON'S Heirs v. SULLIVANT.

Previous to the year 1775, H. S. of Virginia, cohabited with A. W., and had by her the appellants, whom he recognized as his children. In July, 1775, he made his will, which was duly proved after his decease, in which he described them as the children of himself, and of his wife A., and devised the whole of his property to them and their mother. In June, 1776, he was appointed a colonel in the Virginia line, upon the continental establishment, and died in the service, having in July, 1776, intermarried with the mother, and died leaving her pregnant with a child, who was afterwards born, and named R. S. After the death of H. S., and the birth of his posthumous son, a warrant for a tract of military lands was granted by the State of Virginia to the posthumous son, R. S., who died in 1796, in his minority, without wife or children, and without having located or disposed of the warrant. His mother also died before 1796. *Held*, that the children of H. S. were not entitled to the lands, as devisees under his will, under the act of Assembly; nor did the will so far operate, as to render them capable of taking under the act, as being named his legal representatives in the will.

The appellants were not legitimated by the marriage of H. S. with their mother, and his recognition of them as his children, under the 19th section of the act of descents of Virginia, of 1785, which took effect on the 1st of January, 1787.

The appellants were not, as illegitimate children of H. S. and A. W., capable of inheriting from R. S. under the act of descents of Virginia.

APPEAL from the Circuit Court of Ohio. This was a suit in Chancery, and the case upon the facts admitted by the parties, was as follows: Previous to the year 1775, Hugh Stephenson, of Virginia, lived and cohabited with Ann Whaley, and had by her the appellants in this cause, whom he recognized

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as his children. In July, 1775, he made his will, in which he described the appellants as the children of himself, and of his wife Ann, and devised the whole of his property to them, and to their mother. In July, 1776, he intermarried with the said Ann Whaley, and died the succeeding month, leaving her pregnant with a child, which was afterwards born, and was named Richard. The will was duly proved after the death of the testator. In June, 1776, the testator was appointed a colonel in the Virginia line, upon continental establishment, and died in the service. After his death, and the birth of Richard, a warrant for 6,666 and two-thirds acres of military lands, was granted by the State of Virginia to the said Richard, who died in the year 1796, in his minority, without wife or children, and without having located or disposed of the above warrant. His mother also died before the year 1796. The defendant claimed the land in controversy under John Stephenson, the elder paternal uncle of Richard; and the appellants having filed their bill in the Court below to recover the premises in question, the same was dismissed, and the cause was brought by appeal to this Court.

Feb. 18*th.* Mr. *Brush*, for the appellants, stated, that the appellants insisted, that, as representatives of their father, Hugh, the warrant in question ought to have issued to them. All the laws of Virginia, granting military land bounties, were passed after the death of Hugh Stephenson. The act which extends the bounty to those who had died before any bounty was

provided, is that under which the warrant issued. It assigns the bounty to the "*legal representatives*" of the person upon account of whose services it was granted. We maintain, that the term, *representatives*, is used purposely not to exclude the heir, but to embrace others than the legal heir, under the then existing laws. It never could be intended to give a bounty to elder brothers and uncles, who might be in arms against the country; but to the immediate objects of the soldier's attention and care, whom, by his will, he had appointed to represent him, or to that class of relatives, among whom personal property was distributed by the statute of distributions; certainly more just and liberal in its provisions, than the feudal course of descents, by which real estate was cast on the eldest male relative in a collateral line. But, waving this point, the complainants maintain that they are heirs at law of Richard Stephenson. And they maintain this upon two grounds. First. By the Virginia law, regulating the course of descents, passed in 1785, they were legitimated. Second. By the same law, as bastards, they were made capable of inheriting to their deceased brother, on the part of the mother.

1. The ancestor of Richard never had any interest in the subject that constitutes the estate. It is a gratuity given to his representative, who most clearly took as a purchaser, and the estate he held, upon his decease, passed to his heirs generally, without reference to the channel through which he derived it. The estate originated under the laws of Virginia. The parties resided in Virginia, until the establishment of

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the State of Kentucky, where Richard died. The descent was cast, either under the laws of Virginia, or Kentucky; and, in this respect, they are the same. The act of 1785, provides, that "where a man having by a woman one or more children, shall *afterwards* intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated." In the case of Rice v. Efford,[a] and in the case of Sleighs and Strider, cited by Judge Tucker, and given in a note,[b] it is decided, that this act includes cases of births and marriages, antecedent to its passage. This is its plain and natural interpretation. It was meant, as the Judges say, "to protect and provide for "the innocent offspring of indiscreet parents, who had already made all the atonement in their power for their misconduct, by putting the children, whom the father recognized as his own, on the *same footing* as if born in lawful wedlock." It meant to put them on the *same footing*, not only as it respected their father's estate, but in relation to the estates of each other, and the estates of all their kindred. In both the cases above cited, the father died after the act of 1785 took effect; and, in that point, the present case is to be distinguished from them. It would appear, from the case of Rice v. Efford, that the Chancellor considered it a material point, that the recognition of the illegitimate children took place after the act of 1785 was in operation. And Judge Roane expressly says, that the interpretation adopted, "applies to cases only, where the father has died

a 3 *Henn. & Munf.* 225. *b* *Id.* 229.

posterior to the passage of the act." This observation of Judge Roane may properly be termed an *obiter dictum*. The case before him did not require that point to be decided; and, we conceive, that the *dictum* is demonstrably incorrect, as is also the intimation of the Chancellor. The object of the act was to "protect and provide for the children," by giving them a complete capacity of inheritance. To give them this title, the law requires two facts; the marriage, and the recognition by the father. But, it is said, that although the law embraces the case of an anterior marriage, the recognition must be subsequent. Why this distinction? The grammatical construction of the sentence does not require it. The terms, "*shall afterwards intermarry*," are correctly referred to the birth of the children, not the date of the act. In relation to the marriage and the recognition, the statute speaks from the same time. The whole structure of the sentence necessarily connects them. The active participle, "*having*," in reference to the birth of the children, and the passive participle, "*recognized*," in relation to their acknowledgment, are the only terms which could properly be used to describe both anterior and subsequent cases with reasonable precision. Surely it would be a strange construction, by which the active participle is made to embrace both the past and future, while the passive participle, in the same sentence, is confined to future cases only! This can only be done by interpolating the word *hereafter*, so as to make that part of the sentence read, "*such child or children, if* HEREAFTER *recognized by him.*" The object of the statute does

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not require, but absolutely forbids such interpolation. It was designed, as the Court say, in the case of Stones v. Keeling,[a] to establish the most liberal and extensive rules of succession to estates, "*in favour of all*, in whose favour the intestate himself, had he made a will, might have been supposed to be influenced." It operates solely upon the children, and it must have been designed to operate equally upon all in the same situation, whether the acknowledgment was made before or after the passing of the act. The dictum of Judge Roane, evidently grew out of an argument suggested by himself, that the interpretation adopted by the Court, might be considered an invasion of private right. We see no difficulty on this ground; but if there were any, it is not remedied by applying the act to cases only where the father died posterior to its passage.

The possible interest which children have in the father's property, during his lifetime, is not of that absolute character which the legislature cannot control. If it were, every change of the law of descents, would be an invasion of the rights of expectants under the existing law. A descent cast by the death of an intestate, cannot be disturbed by subsequent laws; but that is no reason why the legislature should not change the law, or give to individuals new capacities of inheritance. The security of existing rights remains inviolable, notwithstanding this is often done. By the death of H. Stephenson, before the act of 1785, his property passed

[a] 3 *Henn. & Munf.* 228. in note.

to his legitimate child. If, under that act, the appellants were legitimated, in 1787, they, thereby, could not prejudice the rights of Richard. Their new capacity was altogether prospective. From that day, they enjoyed a character to inherit rights which might thereafter accrue; and, in relation to those rights, we do not see what bearing the time of their father's death has upon the question. In the case of Sleighs v. Strider, W. Hall devised land to his son, R. Hall, for life; and after to his eldest son and his heirs forever: but if no male issue, to his eldest daughter and her heirs. Richard Hall had an illegitimate son born in 1776: in 1778 he married the mother, and recognised the son till his death, in 1796. He had also daughters after the marriage. It was determined that the son was legitimated, by the act of 1785, and entitled under the devise from his grandfather. It would seem, from the dictum of Judge Roane, that if Richard Hall had died before the 1st of January, 1787, the grandson never could have been legitimated. Whether he could or not, the eldest daughter must have taken. But suppose that the grandson had lived until 1788, and, in the lifetime of his father, had died leaving issue: would such issue, or the eldest daughter of Richard, have taken under the devise? We maintain that the issue of the deceased son would have taken: from which we infer that the time of death is immaterial. The interpretation of the Virginia Courts can only be made rational and intelligible by rejecting the limitations suggested by the Chancellor and Judge

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Roane, and applying the statute to all persons within its literal meaning, without reference to the time of the recognition, or the death of the father. By this course, the new capacity, in all, will take date from the 1st of January, 1787, and will confer rights from that day only; as in cases that have arisen since the statute, the legitimate rights of the children, born before marriage, all take date from the marriage, without any reference to the time of recognition, or the death of the father.

2. We insist that the appellants, being the bastard brothers and sisters of Richard on the part of the mother, are his heirs at law. The law of 1785 contains this provision: "Bastards also shall be capable of inheriting and transmitting inheritance, on the part of the mother, in like manner as if lawfully begotten of such mother." In adopting a rule for the interpretation of this provision, we insist, in the language of the court, in the case of Stones v. Keeling,[a] that "the act relates to the disposition of property only; and proceeds to show who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto; and in that light the law ought to receive the most liberal construction; it being evidently the design of the legislature, to establish the most liberal and extensive rules of succession to estates, in favour of all, in whose favour the intestate himself, had he made a will, might have been supposed to be influenced." It gives to bastards a full

[a] 3 *Henn. & Munf.* 228. note.

and complete capacity of inheritance, through the maternal line, both lineal and collateral. By nothing short of this can the terms of the law be satisfied. It is said, however, that the terms of the law are fully satisfied when it is extended to inheritance direct, between the bastard and the mother; thus excluding collateral descents between bastards altogether. This doctrine is founded upon an entirely erroneous rule of construction. It is assumed that the statute being an innovation upon the common law, must be construed strictly, and extended only so far as the letter absolutely requires. The Virginia Courts, in the cases referred to, have adopted a different rule; and a rule more consonant to reason and justice, and to our free and equal principles of government. The incapacities of bastards grew out of the feudal system, and originated in the dispositions of the feudal lords to multiply escheats and forfeitures. Most undoubtedly it was the intention of the Virginia legislature, to cut up the whole system root and branch. If bastards cannot inherit from a legitimate brother, they cannot inherit from each other. Neither can they inherit from, or transmit inheritance to, uncles, grandfathers, or any collateral relative whatever. By the same rule, legitimate brothers and sisters cannot inherit from bastards, or their descendants. And if this be the case, who can say that bastards are capable of inheriting " and transmitting inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of such mother."

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Mr. *Doddridge*, contra, stated, 1. that in examining the appellants' claim to hold the lands in question, as the legal representatives of Hugh Stephenson, under his will, he would contend, what indeed seemed to be admitted on the other side, that Richard Stephenson took by purchase from the State, and that Hugh never had an interest in the subject, legal or equitable, which he could devise, or which could pass from him in a course of descents If this be so, it would certainly follow, that upon the death of Richard, under age and without issue, after having survived his mother, the estate passed from him to his heirs general, according to *the letter* of the act directing the course of descents, as the appellants' counsel contend, and without reference to the channel through which he obtained it. But we shall insist, that according to the *equity* of the 5th section of the act of descents, the land passed to the fraternal kindred

One of the laws of Virginia on the subject of land bounties refers to them, as having been "promised by ordinance of Convention." This circumstance made a search for that ordinance necessary. There were three sessions of a Convention held in the year 1775. By an act of the last, the Convention of 1776 was regularly elected. The present controversy has had the effect of collecting the journals of both Conventions. They are now, for the first time, published. A perusal of them will show, that the Conventions, although they provided for raising troops, never made a promise of land bounty to any description of the public forces. Indeed, until they declared the State inde-

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pendent, they had asserted no claim whatever to the crown lands, such a promise would have appeared absurd. The first mention of a land bounty will be found in the acts of the first regular General Assembly at their October session in 1776, chapters 11. and 21. *enacted after the death of Hugh Stevenson.* The practice of giving bounties in land was followed up by the acts of October, 1778, c. 45, May, 1779, c. 6., and the manner of carrying them into grant was provided for by the acts of May, 1779, c. 18. and of October 1779, c. 21. But these laws having omitted to provide for the heirs of those who were, or should be, lost in the service, two others were passed. By the first a promise was made to the officers and soldiers, *then living*, in these words: "and when any officer, soldier, or sailor, *shall have fallen, or died* in the service, his *heirs or legal* representatives shall be entitled to, and receive, the same quantity of land as would have been due to such officer, soldier or sailor, respectively, had he been living."[a] The second is in the following words, (comprehending the case of H Stevenson:) "That the legal representatives of any officer, on continental or State establishment, who may have died in the service, *before the bounty in lands promised by this or any former act*, shall be entitled to demand and receive the same in like manner as the officer himself might have done if living. It is observable, that the latter act only respects the heir of an *officer* who had fallen before any land bounty was promised

[a] *Chan. Rev. Code*, 112.

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to any person; whereas the former is an encouragement held out to the living officer, soldier, and sailor, &c. By the latter act, it is evident that the bounty conferred by it was not given to those *who died before any bounty was provided;* nor to the legal representatives of those, on account of whose services the same was given, as such. The bounty is directly given to the legal representative for the loss of an ancestor; and is so much as the father would have been entitled to had he lived or fallen in the service, &c. Here, if the heir took *quasi* heir, the debts of his ancestor might sweep the gift away. The difference between pay and bounty cannot well be overlooked. The first is a vested estate, and, as such, subject to debts and legacies. Bounties to the widow or heir, are in the nature of compensation, or of gratuities for a loss, and are taken directly from the hand that gives. Hugh Stevenson had not, at the time of his death, even a promise of the bounty in question, nor of any other bounty. His services entitled him to his pay and subsistence alone.

It is difficult to comprehend what is meant by the opposite counsel, when he speaks of those "whom by his will he had appointed to represent him, or to that class of relations among whom personal property was distributed by the statute of distributions." As to the statute of distributions, it is enough to say, that then, as well as now, it no more embraced a bastard than the feudal law of descents. And as to the terms "appointed by his will to represent him," if they mean any thing, they mean the persons to

whom the party had devised the property in question. But could Hugh Stevenson devise the property in question? Real estate in Virginia was never devisable at the common law. In 1776, the English statute of wills was in force. Under that statute, those only who were *seised*, could devise. The construction of that statute was the same in England and Virginia. Those lands only, which the testator had at the time of making his will, could be devised. The Virginia statute of wills empowers a party to devise such estates, real or personal, as the party hath, "or at the time of his death shall have," &c. This statute passed in 1785, and began its operation on the 1st of January, 1787. It is, then, obvious that the appellants cannot claim as devisees, neither at the common law, nor under the English statute of wills; nor even under the Virginia statute of wills, if it had been then in force; because neither at the time of making his will, nor at the time of his death, had the testator any interest in the premises.

2. The appellants claim as heirs at law to Richard, under the 19th and 18th sections of the act directing the cause of descents. The 19th section is in these words: "Where a man having, by a woman, one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." The issue also in marriages deemed null in law, shall, nevertheless, be legitimate. And the 18th section is in these words: "In making title by descent, it shall be no bar to a party that any ancestor through

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whom he derives his descent, was, or shall have been, an alien. Bastards also shall be capable of inheriting or transmitting inheritance *on the part of their mother, in like manner as if lawfully begotten of such mother.*"

In the construction of statutes no authority need be quoted for the following rules of interpretation. 1st. All the acts passed at any one session of a legislative body are to be taken together as one act. 2d. Consequently, the same words or phrases, as often as they occur, are to be construed to have the same meaning when that can be given them without gross violation of the sense. 3d. The acts of the same session, made in *pari materia*, are to be taken together as one act. The marriage act, the act of descents, the statute of wills and distributions, and the act respecting dower, were made in *pari materia*. Marriage is the source of all legitimate birth, and, as such, the cause of dower, of descents, and of distributions. These laws have extraordinary claims to be considered as one statute. They were compiled at the same time, by the same committee, composed of the ablest lawyers and civilians of their country—enacted at the same session of the same legislative body, in the same year, (1785;) and, lastly, all went into operation at the same time, on the 1st of January, 1789. They will be found to contain a complete code for the government of domestic relations, without any contradictions or discrepancies. These four statutes contain 164 sections; in almost every one of which the future verb *shall* occurs, and in all of which, with the exception

of the 7th section of the marriage act, (which confirms past irregular marriages,) its future operation cannot be disputed, nor never has been disputed.

With the rules of construction already stated, and this view of the four statutes, we will proceed to show, that the appellants' construction of the 19th section is incorrect. And this, 1st, on principle, and, 2dly, on authority. First. The rules of construction entitle us to give to the verb *shall*, in this section, the same meaning intended whenever it occurs in any of the statutes. If the legislature had intended to confer legitimacy on those *recognized before the* 1st of July, 1787, they certainly would have left us nothing for construction. They would not have been less cautious than in the preceding section they had shown themselves on a less important subjec; "is or *hath been* an alien," &c. Again; it is the obvious policy of a just legislature, that this act should operate prospectively, not retrospectively. Words which might bear both constructions, ought to be expounded according to that policy; to give a statute a retroactive effect without evident necessity, is inconsistent with this policy. To give to this act an operation upon past births and marriages, is to carry the liberality of construction far indeed. But to cause it to operate on the past recognitions of the father who is dead, before the commencement of the statute itself, would be unjustifiable. The principle of the law is, that after marriage, the father, if he pleases, may render his children legitimate. Legitimation, in this view, is the effect of the father's agreement; an effect of which he must be sensible,

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to make it his act. It is easy to conceive of cases in which a father, willing to soothe his wife, and make the best of his case, might be brought to say that her children, born before their marriage, were his, at a time when such acknowledgment would have no legal effect whatever; but who, with the provisions of this statute before him, would make such an acknowledgment; an acknowledgment which would make the child his heir, and pledge him to the mother and the world to provide for it as such: To construe the act as having a retrospective effect on past recognitions, would, therefore, be against the general policy of legislation; contrary, often, to the wish of a deceased individual; and might be productive of much injury to private rights.

But, it is said, that the possible interest which children have in the property of their father in his life time, is not of that absolute character which the legislature cannot control. This is admitted, and the statute of descents is an exercise of such a control. But the new rule of descents created by that act, is known to the proprietor in his life time, and if that pleases him not, the statute of wills, of the same date, is placed in his hands, and enables him to control the act of descents. Again; it is a maxim that *nemo est hæres viventis*. In life, the relation of father and child exists between legitimates, but not between illegitimates. The relation of ancestor and heir, presumptive or expectant, may exist while the former is still living. But the legal relation of ancestor and heir never does exist until the death of the father. The moment the eyes of the father are closed in death, is

that in which this legal relation begins to exist, and from that time it becomes unalterable. So, after his decease, Hugh Stephenson became ancestor to Richard in *ventre sa mere;* but not the ancestor of the appellants.

To examine the 19th section upon authority. The cases of Rice *et al.* v. Efford *et al.*[a] and of Stones v. Keeling, and Hughes v. Striker,[b] are all that bear upon the subject. The only question which seemed to create much difficulty in those cases was, whether births and marriages, before the act, were embraced by it? and the decisions are, that such births and marriages are embraced, where the children, born before wedlock, had been recognized by the father, after the 1st of January, 1787. But this is said to be nothing more than an *obiter dictum* of Judge Roane. But we regard it as the reasoning of the Court, given by the only Judge who gave any reason for the decision. A decision, that marriages and births, before the act, are embraced by its provisions, because the recognition took place after the act was in force, is plainly a decision, that, but for the subsequent recognition, prior marriages and births could not be considered as within the act. These cases furnish good authority for applying the 7th section of the marriage act, to marriages contracted *before*, but *existing* on the 1st of January, 1787; and for substituting the words "hath been," in the act of descents respecting aliens, for the words "*shall have been.*" If this be correct, both those provisions will accord with the residue of the acts containing them,

a 3 *Henn. & Munf.* 225. *b Ib.*

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and with the act concerning dower, and the statute of wills and distributions. The operation of all, will then be prospective.

The statute of descents shows, that wherever, in adopting the civil law, its framers meant to exceed or fall short of its provisions, they have done so in explicit terms. By the civil law, the marriage of the parents legitimated the children previously born, without the father's recognition.[a] This legitimation was the subject of the famous proceeding at the parliament of Merton. The ecclesiastics there demanded, that the marriage of the parent should legitimate the children; to which the barons returned their memorable answer: "*Nolumus leges Angliæ mutari.*"[b] The common lawyers of England, therefore, would not agree to adopt the civil law in this particular. But the common lawyers of Virginia, who compiled the act of 1785, determined to adopt the civil law in this particular, *sub modo;* that the marriage of the parents should legitimate the children, *provided the father should afterwards recognize them.* It is contended, on the other side, that this recognition is nothing more than statutory evidence of the fact, which might be otherwise proved, and is not of itself a substantive provision. If this argument be correct, then by the common and civil law a bastard must always have been the heir of his natural father, provided the identity of that natural father could be proved. But as we know that the mother, both by

a 1 *Bl. Comm.* 455. *Just. Inst. l.* 1. *tit.* 11. *s.* 13.
b 1 *Bl. Comm.* 455.

the common and civil law, was always a competent witness to establish the fact of the father's identity, and yet never resorted to for the purpose of making her child heir to the father, we have a right to conclude, that the recognition required by the statute, is something more than mere evidence of the fact.

3. The appellants claim as heirs of Richard Stevenson, under the 18th section, and in support of this claim they contend, that the terms, "inheriting or transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten of such mother," confer a capacity to inherit and transmit inheritance in the ascending as well as descending line, and also from and among collaterals. Their doctrine amounts plainly to this: that by the true construction of the second member of the 18th section, bastards are made the legitimate children of their mothers, at least for the purposes of inheritance.

In expounding the statute of descents, it has been justly remarked by Judge Tucker, that the framers of it were eminent sages of the law, and complete masters of its technical terms. This being the case, it would be reasonable to look for the same technical language, in all cases where the same thing was intended. When in the 19th section of the act of descents, and also in the marriage act, they remove from certain classes of bastards all the disabilities under which they laboured, they employ that legal term which conveys their meaning clearly, and leaves nothing for construction. They say they shall be "legitimate," not that they shall be capable of inheriting "on the part of their mothers and fathers;" leaving

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us to inquire after the extent of the capacity. The law causes them to change characters. They cease to be *bastards*, and become the legitimate children of their father and mother. The consequences of their legitimacy follows. They have father and mother, sisters and brothers, uncles and aunts, with an universal capacity of inheriting and transmitting inheritance. The 18th section immediately preceding, if it had been intended to make bastard children the legitimate offspring of their mothers, would have followed the same language, and would have left nothing to interpretation. That section would have read thus: "In making title by descent, it shall be no bar to a party, that any ancestor through whom he derives his descent from the intestate, is, or hath been an alien or *a bastard*. Bastards also shall be considered in law as the legitimate children of their mother." The 19th section, like the marriage act, gives no new capacities to bastards as such. They make certain persons of that description *legitimate*, and the capacities of legitimacy follow of course. They inherit to both parents, not as bastards, but as their legitimate offspring.

The second proposition of this argument is, that all the disabilities of bastardy are of feudal origin. With us it is of Saxon origin. The term bastard being derived from a Saxon word, importing a bad, or base, original. The disabilities of bastardy are the same under the civil as under the common law, and in all ages and nations.[a] He has no ancestor;

[a] *Rees' Cyclopedia, art. Bastard. Cooper's Just. Inst.* 37. 1 *Bac. Abr.* 510.

no name; can inherit to nobody, and nobody to him; can have no collaterals nor other relatives except those descended from him. He can have no surname, until gained by reputation. This is the origin of new families. He is the *propositus* by common law. But by the civil law he can inherit his mother's estate.[a] She is, therefore, the *propositus* of the civil law. Collaterals descended from a male relative are by the civil law termed *agnati*; those descended from a female relative *cognati*.[b] In a note to Cooper's Justinian, which I take to be from the pen of Sir Henry Spelman, it is said that illegitimate children can have no *agnati—Quia neque gentem neque familiam habent.* If for this reason they can have no agnati, it follows that they can have no cognati; and this is the reason of Justinian's broad proposition, that bastards can have no collaterals; which is our doctrine in this case.

It is admitted that the 18th section does not give legitimacy except specially for inheritance; that is, it removes that incapacity, and no other: finding and leaving them bastards. Now, there are no other disabilities except the incapacity to inherit or to hold a church dignity.[d] And since these dignities do not exist in the United States, if it had been the intention of the legislature to place the bastard on the footing of a lawful child of his mother, for the purposes of inheritance, and thus to admit him among collaterals in her line, it is inconceivable why they should not have

a 2 *Bl. Comm.* 247. *b Cooper's Just. Inst.* 561.
c Cooper's Just. Inst. 561. note. *d* 1 *Bl. Comm.* 459.

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said at once, that bastards shall be considered in law the legitimate children of their mother. Instead of which, they have used a technical term, *ex parte materna;* which in the civil law is constantly opposed to this other term, *ex linea materna.* The first importing a capacity of lineal inheritance; the other, that, and collateral inheritance also. Neither by the common nor civil law could she inherit to her child, even chattels; she is not mother for inheritable purposes by either code; and the 18th section has given her no inheritable blood of her child. Being incapable of inheriting herself, she cannot give inheritance to a legitimate child by the civil law; because, by one of its canons, the child can never succeed by representation or succession, where the parent could not.

So far, therefore, is the assertion, that the heritable disabilities of bastardy are of feudal origin, from being correct, that they were known and enforced from time immemorial in all nations; were known and enforced in England, before the Norman sat foot there. The Ecclesiastics at Merton did not demand of the king that bastards should inherit even to their mother. They simply demanded, that by the intermarriage of their parents they should become legitimate; which was refused.

But it is contended by the appellants' counsel, that the words, "in like manner as if lawfully begotten of such mother," apply as well to collateral as lineal inheritance. But what is that which a bastard has capacity to do, "in like manner as if lawfully begotten of his mother?" The answer is in the words of

the statute, "of inheriting and transmitting inheritance *on the part of his mother.*"

But, we insist, that although Richard Stevenson, the son, took by purchase from the State; yet he took *quasi* heir, to hold as such to the use of his male ancestry, under the equity of the 5th section of the act of descents: "Provided, nevertheless, that where an infant shall die without issue, having title to any real estate of inheritance derived by purchase or descent from the father; neither the mother of such infant, or any issue which she may have by any person other than the father of such infant, shall succeed to, or enjoy the same, or any part thereof, if there be living any brother or sister of such infant on the part of the father, or any brother or sister of the father, or any lineal descendant of either of them." The principle of this section is, that the estate which came from a male ancestor, shall return to his stock. The principle of the 6th section, immediately following it, is the same; that the estate which came from a female ancestor, shall return to her stock. It is admitted, that the case of Richard Stevenson is not within the letter of the 5th section; but is it not within the equity of it? The estate came not from the father by descent, or by gift; but in equity we may pursue the consideration of the grant, and have a right to inquire, whether that consideration was furnished in common, by the paternal and maternal kindred; and, therefore, ought to pass to both lines. The consideration of the grant to Richard Stevenson, is his father's military service, and his death in that service. Loss is a valua-

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ble consideration for a grant, and the grant ought, in consequence, to be made to the heir of the family suffering the loss. A military bounty is in the nature of compensation for a loss, or of a gratuity for services. It is intended to supply to a family, as far as the liberality of the country can supply the place of a lost member. They are intended to avail the heir in his pecuniary concerns to the extent to which it is supposable his father's labour might have availed him had he lived. In this view, therefore, the bounty, given by law to the heir, is, in equity, a paternal estate, and should descend and pass to the paternal kindred, in exclusion of the maternal.

The *Attorney-General*, on the same side, contended, that the appellants were not entitled, either as legal representatives of Hugh, or as heirs of Richard Stevenson.

1. The appellants were not the legal representatives of Hugh Stevenson; for *legal representatives* are those whom the law appoints to stand in a man's place, and such was not the case of the appellants. The law recognized no connexion between them and Hugh Stevenson.

But, it is objected, that the father had made them his legal representatives by his will. This admits of various answers: but one is sufficient, that the will was a nullity; it was revoked by the subsequent marriage and birth of a child.[a] Neither, therefore, by operation of law, nor by any act of Hugh Ste-

[a] Wilcocks v. Rootes, 1 *Wash. Rep.* 140.

venson, does it appear that the appellants were his legal representatives.

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2. Neither could they inherit as heirs to Richard Stevenson; for, being natural children, there was no common blood between them.

It is again objected, that they were legitimated by the 19th section of the law of descents. But this clause has received a judicial exposition by the highest Court of the State, in which the law was passed, and is now the settled law of that land. In the cases of Rich v. Efford,[a] and Sleighs v. Strider,[b] the Court of Appeals of Virginia decided, that the act applied to cases of prior births and marriages; but, that to give it an application, the father must have been in life after the passage of the act. In this case, the father had died more than ten years before the act took effect, and, consequently, the case at bar is not within its operation. But, it is said, that the Court of Appeals were right in extending the law to cases of births and marriages antecedent to the act; but they were demonstrably wrong in declaring, that the act applied to cases only in which the father had died posterior to the act. To which we answer, that the precedent cannot be divided; if it is to have the authority of a precedent, it must be taken altogether; it cannot be entitled to the authority of a precedent so far as it favours the opposite side, and be open to dispute so far as it destroys their position. It has been the settled law of Virginia, since the year 1805; for it was then that Sleighs v. Strider was

a 3 *Henn. & Munf.* 225. b *Id.* 229. note.

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decided, and though its correctness may have been originally doubtful, yet extreme inconvenience follows the disturbance of a rule of property which has been so long settled; and that this argument *ab inconvenienti*, was of great weight in the estimation of the Court of Appeals itself, may be seen from the proposition to reconsider the decision of that Court in the celebrated case of Tomlinson and Delland. The original decision in that case, which subjected the succession to personal property, to the feudal principle, which, in relation to lands, respected the blood of the first purchaser, had been made in 1801. It having produced great excitement in the State, and being very generally disapproved, a reconsideration was most strenuously pressed in 1810, nine years only after the original decree; but a majority of the Court was of the opinion, that the inconvenience of overthrowing what was already considered as a settled rule of property, was too great to be encountered, even if the decision were erroneous at first. It is true, that they thought the decision called for by the stern language of the law; but from one of the Judges this opinion was wrung with such manifest reluctance, that it was believed he would have come to a different result had the question heen *res integra*. Here the rule having been settled, the Court will say how far it ought now to be considered as the settled law of the State.

If, however, these precedents be open to question at all, they are open throughout; and if the Court of

[a] 3 *Call's Rep.* 185.

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Appeals erred at all, it was not in limiting the operation of the law to cases in which the father has died since the act took effect, but in extending it to cases of births and marriages which happened anterior to the passage of the law. This law took effect on the 1st of January, 1787. The births, the marriage, the recognition, and the death of the father, had all occurred in, and prior to August, 1776. Had the legislature of Virginia the right to pass a retrospective law? The Court of Appeals said not, in the cases of Turner v. Turner's executors,[a] Elliott v. Lyell,[b] and the Commonwealth v. Hewitt.[c] Even where it has been attempted to apply a new remedy to pre-existing rights, it is said the language must be irresistibly clear, or the Court will not give it such retrospective operation.

Does the language of this act clearly intend to operate on pre-existing facts? on pre-existing marriages and births? We contend that it does not. In the case of the Commonwealth v. Hewitt, before cited, Judge Roane, in resisting the retroactive effect of the law, founds himself, in a great measure, on the general nature of laws, as prospective, and on the time assumed by the act itself for the commencement of its operation, *from and after* the passing thereof. Both considerations concur here, with this farther circumstance in favour of this law, that while it has (in the original act) the usual clause, "This act shall commence in force from and after the passing thereof," a subsequent and distinct law was passed

a 1 *Wash. Rep.* 139. *b* 3 *Call. Rep.* 269.
c 2 *Henn. & Munf.* 187.

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to suspend its operation until the 1st of January, 1787. Again; this act commences with a general declaration, most unequivocally prospective. The first clause is, "be it enacted by the general assembly, that *henceforth*, when any person having title, &c." According to settled rules of construction, therefore, the force of this expression, *henceforth*, runs through every subsequent clause. The 19th section under consideration ought to be read thus: "Be it enacted that, HENCEFORTH, [that is, after the 1st of January, 1787,] where a man, having by a woman, one or more children, shall, afterwards, intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated." Is this language so irresistibly retrospective, in relation to the date of the law, that the Court is constrained to give it that construction? Is it not, on the contrary, so obviously future and prospective, that it requires subtility and violence to wrest it to a retrospective meaning? The verbs which indicate the acts that are to produce the effect of legitimation, are in the *future* tense. It is insisted, therefore, that the clause has no application to any case, but to one in which all the facts on which it is to operate, shall happen after its passage; the birth of the children, the marriage, and the recognition. It is true, that in speaking of the children, the present participle is used, "*having* one or more children." But the present tense of this participle relates, not to the time of passing the act, but to the time of the marriage, "having," at the time of the marriage, "one or more children." This is not a new use of the present tense; grammarians tell us that the present tense is occasion-

ally used to point at the relative time of a future action. The true reading of this part of the act is this, "where" (i. e. in all cases, hereafter, in which) "a man shall marry a woman, having by him, at the time, one or more children." Thus, the participle, although present at the time of the marriage, is future in relation to the passage of the act. This is no unusual application of this participle;—if I say, "if a man shall go to Rome, and *having* a dagger in his hand, shall strike it to the heart of the Pope:" the present participle is properly used in it; it is present in relation to the action with which it stands connected, though future, in relation to the time of speaking. So the present participle here is present in reference to the act with which it clearly stands connected, the act of marriage; although future in relation to the date of the act. The sense is the same as if the legislature had said, "wherever, hereafter, a man *shall have* one or more children by a woman, and *shall, afterwards*, intermarry with her," &c. It is only by this construction which considers both the birth and marriage as *future*, that the word "*afterwards*," used in the act, acquires a grammatical sense, or, indeed, any kind of sense. To prove this, let us see what the effect will be of considering this participle, as used in the present tense, in reference to the time of passing the act. Then the sense will be, "where a man *now* having one or more children by a woman, shall *afterwards* intermarry with her:" it is clear that the word, *afterwards*, becomes insignificant and senseless. It adds nothing to the meaning; for if a man *now* having one or more children by a woman, *shall intermarry* with

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her, he must of necessity intermarry with her *afterwards*; for the future verb, *shall intermarry*, makes the act *future*, in relation to the passage of the act; and the adverb of time, *afterwards*, *added to the verb*, does not perform its appropriate function of adding a new quality to the verb. It is a useless clog, therefore, on the sense, because its tendency is to obscure, and not to illustrate the sense. Whereas, the construction for which we contend, (by considering both facts as posterior to the act, but the marriage as being posterior to the birth,) gives the word, *afterwards*, force and significancy; it then performs the office of arranging the order of the two future events. In this point we differ from the Court of Appeals of Virginia, and insist, that the liberality which would apply this act retrospectively, to previous births and marriages, is a liberality which looks beyond the judicial sphere, and belongs only to the legislature. What is the argument on which the Court of Appeals (and the opposite counsel, after them) ground themselves in extending this act to antecedent births and marriages? "I see no difficulty," says Judge Roane, in Rice v. Efford,[a] "except what arises from the words, *shall afterwards intermarry*, which might seem to import only marriages to be celebrated in future: that word, *afterwards*, however, is rather to be referred to the birth of the children, than the passage of the act; and no good reason could possibly have existed with the legislature for varying the construction of a section, embracing two descriptions of cases standing on a similar foundation." The counsel for the appellants, seizing this

[a] 3 *Henn. & Mumf.* 231.

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passage, has said, the terms, "*shall afterwards intermarry*," are correctly referred (by the Court) to the birth of the children, not to the date of the act. This is not accurate: it is not the *three* words, *shall afterwards intermarry*, that are referred by the Court to the birth of the children: but the word, *afterwards*, alone. *This*, we admit, is correctly referred to the birth of the children: but the Court having correctly gained this conclusion, forget the force of the future verb, "shall intermarry." We say, that the force of this future verb requires that the marriage shall be after the act. That *henceforth*, "where a man having by a woman one or more children, shall afterwards intermarry with such woman," irresistibly demands a marriage future to the date of the act: that the words, *shall intermarry*, make the marriage future in relation to the act. The word, *afterwards*, removes the marriage farther off, and marks its futurity in relation to another event, the birth of the children; which other event, although expressed by the present participle, is itself drawn forward into futurity by the force of the word, *afterwards*, to which it is attached. That such an intention is utterly inconsistent with the prospective character given to the whole act, by the force of the word *henceforth*, and in the commencement. That the force of this word runs through the whole act; and that, used in the clause under consideration, it would render the retrospective construction of that clause absurd. In the passage cited, Judge Roane says, that no good reason could possibly have existed with the legislature, for varying the construction of a

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section embracing two descriptions of cases, standing on a similar foundation. This might have been a good argument on the floor of the legislature, to induce them to embrace past cases; but it is no argument to prove that they have embraced them. Whether they ought to have embraced them is a very different question from whether they have actually done so. The first is purely a legislative question; the last purely a judicial question, and the only question in the case for the Court.

But it is said, the appellants do not seek to give the act a retrospective effect; they say that the act, from the time it took effect, clothed the appellants with a new capacity of inheritance, not in relation to rights previously vested, but in relation to inheritances which might thereafter fall. Let it be admitted that their position is such; let it also be admitted, that the legislature had the right to clothe them with such new capacity in relation to future inheritances. But the question still remains, have they done so: is it to persons in their predicament that this new capacity of inheritance is extended? We have endeavoured to show that it is not: whether the Court look to the exposition of the statute by the tribunals of the State, or whether they look to the construction of the statute, *per se*. The Court of Appeals of Virginia, while they admit the application of this statute to antecedent births and marriages, decide that the law applies to cases only where the father has died posterior to the passage of the statute. The reasoning on which the Court ground this distinction is not fully developed by them: the appellants' counsel infers their reason-

ing, and, as we may safely admit, contests it with success. But there is a reason for requiring that the father should continue in life after the act, which applies with equal force both to the marriage and the recognition, and corroborates the construction drawn from the language of the law, that both those facts should be posterior to the act. It is this: the statute attaches new legal consequences to the act of marrying a woman by whom the man had, previously, had children; and to the act of recognizing such children. Make the law prospective in those particulars, and the citizens for whose government it was intended, have it in their choice, by performing those acts thereafter, to incur those consequences or not. But attach those consequences to a past marriage and recognition, and you change the legal character of a past transaction by an *ex post facto* law. By a subsequent law you attach consequences to an act which did not belong to it when it was performed. It is precisely for this reason that *ex post facto* laws are prohibited; because consequences are attached to an act which did not belong to them at the time; and which, consequently, could not have entered into his consideration of the question, whether he would commit it or not. You surprise him by a new case, on which his judgment was never called to pass, and when it is too late to retract the step and avoid the new consequences.

3. The next ground taken by the claimants is, that if they were not legitimated by the 19th section of the law of descents, they were made capable of inheriting from Richard by the 18th section of that

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law.[a] It is contended on the part of the appellants, that this clause opens an inter-communication of blood through the mother, to an indefinite extent lineally and collaterally. But we insist, that it only gives to the natural children the faculty of inheriting immediately from the mother, and of transmitting such inheritance to their posterity. The legislature has not said, that natural children shall be considered as lawfully born of their mother for all the purposes of inheritance pointed out by the act. It has given them two capacities of inheritance only; the capacity to inherit on the part of the mother; and the capacity of transmitting inheritances on the part of the mother. These capacities, it is true, they are to enjoy, in like manner "as if they had been lawfully begotten of the mother." But these words, "as if, &c." do not add to the number of their heritable capacities; they seem only to designate the extent to which they shall enjoy the two *specific capacities* which are *expressly given them.*

Do these capacities authorize them to claim the inheritance from Richard? What are they? 1st. That they shall be capable of inheriting on the part of their mother; 2dly. That they shall be capable of transmitting inheritance on the part of their mo-

a Which provides, that "in making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is, or hath been an alien. Bastards also shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

ther. The last capacity it is not contended, has any application to the case at bar. This not being the case of an inheritance transmitted through the natural children, but one which they claim directly for themselves. If they are entitled, therefore, their title must arise under the first capacity, that of inheriting on the part of their mother. What is the meaning of this expression, *on the part of their mother?* The counsel on the other side contends, that it means *from* or *through* the mother; that it connects the bastard with the ancestral line of the mother, and through her, collaterally, with all who are of her blood. On the other hand, we insist, that the capacity does not go beyond an inheritance *from* the mother, and the transmission of that inheritance lineally and collaterally among their descendants; or, in other words, to make the mother the head of a new family. The expression "on the part of the mother," does not carry the mind beyond the mother, unless connected with words of more extensive significance, such as, *ancestors* on the part of the mother, or *descendants* on the part of the mother; and here it would be the supplemental words which would produce the effect, not the words, "on the part of the mother." But, it will perhaps be urged, that in the case of Barnitz v. Casey,[a] the counsel upon both sides, and the Court, seem to have understood this term in the sense contended for on the other side. That case arose on a statute of Maryland, in which the force of the term is expounded to mean,

[a] 7 *Cranch*, 476.

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from *or through*. In our case, the Virginia statute furnishes an opposite inference. The expressions, "*on the part of the father*," and "*on the part of the mother*," occur in the 5th section of the law of descents. It is the only instance in which they do occur, and there they are indisputably synonymous with "*of*" and "*from*" any brother or sister of such infant *on the part of the father*, and so *vice versa*. It is said, that this provision places the natural children on the footing of legitimate children to all the purposes of inheritance. But, we would ask, does it enable the mother to inherit *from* them? Does it enable the mother's ancestors or collateral relations so to inherit? The provision is, that the *natural children may inherit from the mother*. But where is the provision that the mother may inherit from them, or that her relations may inherit from them? It is not to be found; the legislature did not look upwards beyond the mother. It was not their object to force her natural issue upon a family which she had dishonoured and offended by bringing them into the world. That they should have connected them with *her* was just and proper; she could not complain. But to have connected them with a family from which she had probably been expelled on account of her infamy, and to have given them a capacity to inherit the estates of that family, would not have been quite so just or reasonable. We contend, that the legislature have not done it; but that the capacity to transmit applies only to inheritances descending from the mother, and from each other. Again; if the expression, "on the part of the mother," is of the extent contended for,

then the capacity to inherit *on the part of the mother*, is a power to take *inheritances from, or through her, in right of her*. But the inheritance claimed is not of this description; *it is a direct inheritance from a mother*, which, both at the common law, and under the statute, is not an inheritance *on the part of the mother*; it does not come from, or through her, it does not come in her right. So say the Court in the case of Barnitz v. Casey, before cited.[a] That was on the statute of Maryland; the statute of Virginia, in case there is no father, gives the estate to the mother, brothers and sisters, *per capita*, so that the shares taken by the brothers and sisters, are cast at once from the deceased brother on them, and do not come to them, from, or through, or in right of the mother. This is the inheritance which the appellants claim, and which they claim in virtue of their specific and single capacity to inherit on the part of the mother.

Mr. *Hammond*, for the appellants, in reply, stated, that the argument on the other side, involved the general construction of the act, as well as its operation upon this particular case. It asserts, that the recognition must, in all cases, be subsequent to the marriage; thus proving the consent of the father to the legitimation. Now, if the legitimation does not result from the agreement, or depend upon the assent of the father, this argument is of no avail. The principle is adopted from the civil law. And it is reasonable to suppose, that when the ablest lawyers

[a] 7 *Cranch*, 476.

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and civilians of the country, introduced it into their code, they intended to adopt it as interpreted and understood in the countries where it prevailed. The civilians held, that "this legitimation is a privilege or incident inseparably annexed to the marriage, so that, though both the children and parents should wave it, the children would, nevertheless, be legitimate." The foundation of this doctrine is thus explained: "*Ratio est quia matrimonium subsequens ex fictione legis retrahitur ad tempus susceptionis liberorum ut legitimati habeantur legitime suscepti (i. e.) post contractum.*"[a]

If legitimacy is an incident inseparably annexed to the marriage, it must be the marriage, and not the agreement of the father, that legitimates the child. But there can be no such legitimacy without the agreement or recognition of the father. Agreement and recognition are not synonymous terms. Recognition implies no more than a simple admission of a fact; it is in the nature of evidence. Agreement supposes an assent or compact, from which certain consequences result, made with a view to those consequences. Recognition refers to something past. Agreement implies a transaction from which some effect is to follow. The provision under consideration consists of an enumeration of facts, and a declaration of legal consequences resulting from those facts. The facts are, having children by a woman, and afterwards marrying her. Upon such a case the statute operates, and declares the children legitimate. But the effect follows only

[a] *Hargr.* note. *Co. Litt. fol.* 244. *b.* 245. *a.*

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the legal proof of the facts; and this the statute has defined. There must be a recognition by the father; and this is considered a third fact. Though as a fact it must exist; yet its existence is only necessary to establish the first fact; that the husband of the mother is, in verity, the father of the child. No legal consequences can result, until facts are established by proof. We insist, that the terms "*if recognized by him*," are inserted for the single purpose of defining the proof upon which the material facts should be established, and are to be regarded only as prescribing a rule of evidence for the particular case. Had the legislature intended this recognition as one fact, a principal condition upon which the legitimacy was to be founded, they could easily have connected it with the other facts, so as to have left no doubt about it. The act would have read thus: "Where a man, having by a woman one or more children, shall afterwards intermarry with such woman, AND *recognize such child or children*, they shall thereby be legitimated." As the words now stand in the sentence, they are of very different import. The two principal facts are first enumerated; then proceeding to declare the result, the mode of proof is set down, as it were, in a parenthesis, hypothetically, and indefinite as to time: As much as to say, "when the father and mother intermarry, *if, suppose that, allow that* the father recognized the children, they shall be legitimate." If the recognition of the father is a principal fact; if the legitimacy is the consequence of that recognition, the child could only be legitimate from the time of the recognition. This would in-

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troduce endless confusion and litigation. The rights of parties would always depend upon the time the father signified his assent, or declared his agreement. This never was the doctrine of the civil law. Some referred the legitimation to the birth, others to the time of marriage; but all dated it from the one or the other of these periods. But as legitimation could not exist until the celebration of the marriage, we hold that it must commence at that time, and from that time confer rights upon the parties. A recognition before marriage is within the letter of the act. It supplies evidence as conclusive of the fact to be established, as if made after the marriage. Constantine, who introduced this provision into the civil law, "is supposed to have intended it as an encouragement to those who had children born in concubinage, to marry the mother of such offspring."[a] But in our case, the recognition is in fact subsequent to the marriage. The will speaks only from the death of the testator, and is, therefore, a recognition by him at the time of his death. The appellants were born illegitimate. Their father recognized them as his children. While illegitimate, he declares their mother his wife. He afterwards marries her, and continues to recognize them as his children. He dies. Then comes an act of the legislature, the special object of which is, "to protect and provide for the innocent offspring of indiscreet parents, who had already made all the atonement in their power for their misconduct, by putting the children whom the father

[a] 1 *Woodes.* 391.

recognized as his own, on the same footing as if born in lawful wedlock." If birth and marriage are the facts upon which the act operates, and recognition nothing but evidence of those facts, the decisions already cited are decisive in our favour. It is settled, that the act extends to cases of birth and marriage before its passage; and it is perfectly clear, that the enacting part of the act is prospective. The parties upon whom it is acknowledged to operate, could claim no rights, but those which accrued after the first of January, 1787. It was at that period, and not before, that their new capacity commenced. We have shown, that this interpretation of the act interferes with no vested right: And we have shown how interests in possession may be affected, upon the principle decided in the Virginia Court of Appeals. In the view we take of the case, the death of the father, before the passage of the act, is a circumstance of no importance. It is upon the children, and not upon the father, that the act operates. It attaches upon existing cases, and gives a character to transactions already past. Were he alive, he could not recal the birth, the marriage, or the recognition. A solemn disavowal of the children could not restrain the operation of the law; for we have shown, that legitimation results from the facts, and not from the inclination or pleasure of the father.

The common law rules of succession, both as to real and personal estate, were exceedingly narrow and illiberal. Where those rules have been enlarged by statute, Courts have always given the act a liberal interpretation in favour of the persons let in.

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Thus the English statute of distributions was construed to extend to cases of intestacy that happened before its passage, where administration was granted afterwards.[a] No vested right was disturbed by this interpretation, though it allowed the act a retrospective operation. So in our case, though legitimated by a law subsequent to their birth, the appellants claim a new capacity, only in regard to inheritances that may fall after their legitimacy takes effect. The appellants do not seek to make themselves heirs to their father Hugh. They claim that, upon the death of their brother Richard, in 1796, they were his heirs at law. In making title by descent from a brother, the father is not noticed at the common law. The descent is held to be immediate between brothers. So, by the laws of Virginia and Kentucky, where the father and mother are both dead, the descent is cast directly to the brothers and sisters. If this position could at any time have been doubted, it is now settled by the decision of this Court in the case of Barnitz's Lessee v. Casey.[b]

But if the appellants were not legitimated by the 19th section of the act, they claim that they are entitled, as bastards, under the 18th section. When it is admitted that the act changes the condition of bastards, the extent of that change must be ascertained. By determining the class of cases included, it can be best decided what cases are excluded. The Court are called upon for the first time to put a construction upon this part of the act; and we hold, that it will not be correct to say, that bastards cannot in-

a 2 *Vern.* 642. *b* 7 *Cranch*, 456.

herit collaterally, without showing that the terms and policy of the law can be fairly satisfied, and collateral inheritance between bastards denied. The Court must say that the act confers nothing but a direct lineal succession between bastards and their mother; or they must say that the act removes entirely their incapacity of inheritance through and from the maternal kindred. To this last position it is objected by the counsel for the respondent, that it makes bastards the legitimate children of their mother for purposes of inheritance, which ought not to be done; because if such had been the intention of the legislature, they would have said so in express terms. But does it follow, that the capacity of inheritance would follow the express legitimation of bastards, without providing that such should be the consequence of legitimation? Children legitimated by the marriage of their parents, are no longer bastards. But bastards legitimated in the maternal line, would still, in law, be without a father, and that badge of illegitimacy must ever attach to them. It was a maxim of the civil law, that the Prince could legitimate bastards; but the civilians held, that such legitimation did not confer the right of succession.[a] It was the right of succession, the capacity of inheriting and transmitting inheritance, that the legislature in this case meant to confer; and they have chosen to do it in express terms. There is no room to doubt what was intended; and we think there is no just

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[a] *Domat, Loix Civiles, l.* 1. *s.* 2. *art.* 10.

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foundation for the exceptions and limitations set up by the respondent.

We admit distinctly, that the appellants must take as bastards, or they cannot take at all. They are "clothed with all the attributes and disabilities of bastards, except *the capacity of inheritance, specially conferred on them*, and conferred on them too as bastards." What were the disabilities of bastards at the time the act was passed? They could not inherit. In matters of succession and inheritance, they had no mother, and consequently could have no other relative. But except on the single subject of inheritance, the laws recognised and regarded them as standing in the same relation to their kindred as if born in wedlock. In contracting marriage, bastards were held to be relations, and prohibited from marrying within the Levitical degrees. In the case of Haines v. Jeffell, the Court of King's Bench refused a prohibition, to stay proceedings in the Spiritual Court against Haines, for marrying the bastard daughter of his sister.[a] And the Court said it had always been held so; especially where it was the child of a woman relative. Here the law expressly recognizes the collateral kindred between the uncle and his bastard niece. Bastards are within the marriage act, which requires the consent of parents or guardians to the marriage of persons within age.[b] In this case, Mr. Justice Buller declares that the rule that a bastard is *nullius filius*, applies only to cases of inheritance, and says it was so considered by Lord

[a] *Ld. Raym.* 68.

[b] The King v. The Inhabitants of Hodnett, 1 *T. R.* 96.

Coke. Even Blackstone, who is quite a zealot for the common law doctrines respecting bastards, admits, almost in terms, that bastards were, at the time he wrote, subject to no disability but the incapacity of inheritance.[a] And Woodeson asserts the same thing.[b] In passing the act, the legislature meant to effect a change in the legal condition of bastards, by removing, to *some extent*, the only legal incapacity to which they were subject: and this was a total disqualification to inherit or transmit estates, from or to ascending or collateral kindred. It is, therefore, evident, that the legislature contemplated conferring this capacity, in respect to the ascending or collateral kindred, or both. The civil law distinguished bastards into four classes. Those born in concubinage succeeded to the effects of their mother and relatives, and in some cases to a part of the estate of their putative father.[c] So that the authority of precedent is against the doctrine of the respondent, which would limit the effect of the act to inheritance direct between the mother and the bastard.

But it is urged, that the appellants cannot inherit collaterally, because, legally speaking, bastards have no collateral relations; and therefore the appellants cannot be the brothers and sisters of Richard. This was true before the passage of the act. But does it remain so since? The law then provided, that so far as inheritance was concerned, a bastard was the son of no person. He had neither father nor mother, and, consequently, had no blood to convey

[a] 1 *Bl. Comm.* 486. [b] 1 *Woodes.* 394. [c] *Nov.* 89. *c.* 12. *s.* 4.

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succession except in a lineal descent from himself. There was no blood to convey succession, either to ascendants or collaterals. Having in law no mother, there could be no source from which a bastard could derive inheritable blood, and no channel through which his blood could communicate with that of others. But as this was a provision of positive law, a new provision could restore the connection. Such is the effect of the provision under consideration. "Bastards also shall be capable of inheriting, and transmitting inheritance, on the part of THEIR MOTHER, in like manner as if lawfully begotten of such mother." Henceforth there shall be heritable blood between the bastard and the mother. The bastard has thus a legal mother; and having a mother, a channel is opened through which he can have brothers and sisters, and every other relative in the ascending and collateral line. It was because the bastard had no mother, that he could have no brothers and sisters. The act gives him a mother. He can inherit from, and transmit inheritance to her direct. Heritable blood can flow from the mother to her bastard child, and be traced from the child to the mother, and through the mother to brothers and sisters, and uncles and aunts. The bastard is not legitimated: But his blood is made heritable through that parent about whom there can be no doubt. The character of his blood being changed, he is restored to his kindred in matters of inheritance; the only case in which the law separated him from them. It is true that the appellants were not the brothers and sisters of Richard at the time of his birth, as far as concerned inheritance. But the

act of 1785 has effected a change in their condition; and from the day it took effect, they were in law, and for the purposes of succession to estates, his brothers and sisters of the half blood. Had Richard left brothers and sisters of the whole blood, the 15th section of the act would expressly embrace their case. There was no occasion to make express provision for the succession of bastards, either in the law of descents, or in Judge Tucker's table, because the general provision for the half blood included their case. This is clearly the mode of succession contemplated. They shall inherit *in like manner* as if lawfully begotten.

It is argued that, *on the part of*, are technical terms of the law, which *only* import *immediately from*. The operation of the act is thus limited to a descent immediately from the mother. If we are mistaken in the consequence, which we suppose even this intercommunication of blood must work in the legal condition of a bastard, we must still inquire whether the terms of the act can be satisfied by this narrow construction. We do not admit that the terms, *on the part of*, import no more than immediately from. We insist that they are used to describe the ancestral kindred in the line of each parent. *On the part of the mother*, means, from or through the mother, or her relatives. Thus, brothers and sisters of the same mother, but different fathers, are brothers and sisters on the part of the mother, and are described as such in the 6th section of the act. And in the case of *Barnitz's lessee* v. *Casey*, before cited, the counsel upon both sides, and the Court, seem to have understood these terms in the sense we contend for.

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The capacity of transmitting inheritance, conferred by the act, can have no operation, if the terms, *on the part of*, be interpreted to mean, immediately from the mother. The bastard must transmit the inheritance *to* or *through*, whether it pass to ascendants or collaterals.

The common law disabilities of bastards are, like the canons of descent, of feudal origin: for it must be remembered that this disability relates entirely to inheritance. Escheats are the fruits and consequences, as Blackstone says, of feudal tenure resulting from the frequent extinction of heritable blood, according to the feudal tenure of inheritance. A bastard, being the son of nobody, could have no heritable blood, consequently none of the blood of the first purchaser. The feudal doctrine of carrying the estate through the blood of the first purchaser, inevitably excluded inheritance among bastards. In this sense the disability of bastards was the consequence of feudal policy, and totally inconsistent with the liberal and equitable canons of descent, introduced by the act of 1785. The preference of the male ascending line, preserved by the statute of 1786, is not founded upon feudal doctrines. The inheritance is directed first to the father; not because he is the most worthy of blood, but because he is the head of the family, who can best dispose of the estate among his surviving children: And upon this same principle the grandfather is preferred to the grandmothers and aunts. This is no preference of the male ancestors; but simply a preference of the husband or father, if in existence, to the wife or children of the same person; and the principle of

this doctrine is directly repugnant to that of the feudal or common law. Corruption of blood by convictions for crimes, alienage, and bastardy, were three fruitful sources of escheats at the common law. The principle of extinguishing the inheritable blood, applied to each case. The first was cut up by the constitution of Virginia. The act of 1785 laid the axe to the root of the other two. Not by authorizing aliens to hold lands, or by legitimating bastards. In the one case it permits a citizen, claiming by descent, to trace his relation to an intestate through an alien. In the other, it confers a capacity of inheritable blood upon bastards. The object of both provisions is the same: to enable the kindred of the intestate to obtain the property he left, instead of rapaciously seizing it for the government. The act is clearly remedial, and should be construed liberally in furtherance of the object of the legislature, conformable to the opinions of the Virginia Courts already quoted.

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Mr. Justice WASHINGTON delivered the opinion of the Court. It is admitted by the counsel on both sides, in their argument, with which the opinion of the Court coincides, that Hugh Stephenson, though the meritorious cause of the grant of this land, never took any interest therein, but that the right to the same vested in his son Richard, to whom the warrants issued, as the first purchaser. It is further admitted by the counsel, that the law of descents of Ohio, at the time when Richard Stephenson died, was not more favourable to the claim of the appellants than that of

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Virginia, which will be hereafter noticed; and they have, in the argument, rested the cause upon the construction of the latter law. The opinion of the Court, therefore, is founded on this law.

The appellants object to the decree of the Court below, upon the following grounds: 1. That the land warrants ought to have been granted to them as the representatives of Hugh Stephenson, designated as such by his last will.

2. That by the marriage of their mother with Hugh Stephenson, and his recognition of them as his children, they were legitimated, and entitled to the inheritance in this land as heirs to Richard Stephenson; if not so, then,

3. That, as bastards, they were capable of inheriting from Richard, who, they contend, was their brother, on the part of the mother.

The appellants are not entitled to the lands of H. S. as devisees under his will, or as being named his legal representatives therein.

1. The appellants' counsel do not contend, that their clients are entitled to this land, as devisees under the will of Hugh Stephenson; such a claim would be clearly inadmissible, inasmuch as the testator was not only not seised of the land at the time his will was made, but the law which authorized the grant of it, was not even then in existence. But they are understood by the Court, to insist, that the will so far operates upon the subject, as to name them the representatives of the testator, and to render them capable, as such, of taking under the act of assembly which passed after the death of the testator. The act provides, that where any officer, soldier, or sailor, shall have fallen, or died in the service, his heirs or legal representatives shall be entitled to,

and receive the same quantity of land as would have been due to such officer, &c. had he been living."

This claim is altogether fanciful and unfounded; for, in the first place, the appellants were not appointed by the will to be the general representatives of the testator, but the devisees, together with their mother, of all the testator's property; and, 2dly, if they had been so appointed, still it could not confer upon them such a description as to entitle them to take under the act of assembly, unless the act itself described them as the legal representatives of Hugh Stephenson, for whose benefit the grant was intended; and then, they would have taken exclusively under the act, by force of such legislative description, and not under, or in virtue of the description in the will. It is not likely that the expression, "legal representatives," in the act, was meant to apply to devisees of deceased officers and soldiers for whom the bounty was intended, if they had lived, because, at the time this law was passed, there could not be a devisor of those lands under the general law. It is more probable that they were intended to provide for the case of a person who may have purchased the right of the officer or soldier to such bounty as the legislature might grant to him.

The appellants not legitimated by the marriage of H. S. with their mother, and his recognition of them as his children.

The next question is, whether the appellants were legitimated by the marriage of Hugh Stephenson with their mother, and his recognition of them as his children. This question arises under the 19th section of the act of 1785, directing the course of descents, which took effect on the 1st of January, 1787. This section declares, that "where a man,

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having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated."

There can be no doubt but that the section applied to bastards *in esse*, at the time the law came into operation, as well as to such as might thereafter be born. But it is contended by the counsel for the appellants, that the section is, in every other respect, prospective, not only as to the fact of legitimation, but as to the two circumstances of marriage and recognition, which entitle the bastard to the benefits of the law; and, consequently, that to bring a case within the operation of this section, both the marriage and recognition must take place after the 1st of January, 1787. On the other side, it is admitted, that the privilege of legitimation is not conferred upon a bastard prior to the above period; but it is insisted, that, as to the marriage and recognition, the law should be construed as well retrospectively as prospectively.

In the case of Rice v. Efford, decided in the Court of Appeals of Virginia,[a] the marriage took place prior to the 1st of January, 1787, but the father recognized his illegitimate children, and died, after that period. The whole Court seem to have been of opinion, that the word "afterwards" referred not to a time subsequent to the 1st of January, 1787, but to the birth of the children, and, therefore, that the marriage, though prior to that period, legitimated

[a] 3 *Henn. & Munf.* 225.

the children before born, if they should be recognized by the father. But, it was stated by Judge Roane, in giving his opinion, that the construction of the act applies only to cases where the father has died posterior to the passage of the act.

It is contended by the counsel for the appellants, that since, in the above case, the father recognized the children subsequent to the 1st of January, 1787, this opinion of Judge Roane as to the time of the recognition, was unnecessarily advanced, and is, therefore, entitled to no higher respect than what is due to a mere *obiter dictum*. Be this as it may, it is the uncontradicted opinion of a learned Judge upon the construction of a law of his own State; and is noticed by this Court, not upon the ground of its being considered in that State as of conclusive authority, but because it strongly fortifies the opinion which this Court entertains upon the point decided; which is, that, however the construction may be as to the inception of the right, it is clearly prospective as it relates to the consummation of it. And this prospective operation being given to the act, by requiring the most important condition upon which the privilege of legitimation is to be conferred, to be performed after the law came into operation, it is less material whether the marriage was celebrated before, or after that period. To render the past recognition of the father effectual to give inheritable blood to his children, who were then illegitimate, and incapable of taking the estate by descent, either from him, or from those to whom it should descend, would in some respects at least, partake of the cha-

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racter of a retrospective law. It would seem to be most reasonable so to construe the law, as to enable the father to perceive all the consequences of his recognition at the time he made it.

The appellants incapable, as bastards, of inheriting from R. Stevenson.

The 3d question is, are the appellants, as bastards, capable of inheriting from Richard Stevenson?

The 18th section of the law of descents, under which this question arises, is as follows: "In making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is, or hath been, an alien. Bastards also shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

In the construction of this section, it is never to be lost sight of, that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them, as such, except those from which the section itself exempts them. Though illegitimate, they may inherit and transmit inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions? We understand it to be, that they shall have a capacity to take real property by descent immediately or through their mother in the ascending line; and transmit the same to their line as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expressions, "on the part of the mother or father," when used in reference to the course of descent of real property, in the paternal or maternal

line. As bastards, they were incapable of inheriting the estate of their mother notwithstanding they were the innocent offspring of her incontinence, and were, therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her, as heir to any of her ancestors, had she lived to take as such. The current of inheritable blood was stopt in its passage from, and through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children, or to their legitimate offspring. The object of the legislature would seem to have been, to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother. But although her bastard children are, in these respects, *quasi* legitimate, they are, nevertheless, in all others bastards, and as such, they have, and can have neither father, brothers, or sisters. They cannot, therefore, inherit from Richard Stephenson, because, in contemplation of law, he is not their brother; and even if he were their brother, they would not inherit their estate under this section, *on the part of their mother*, but directly from Richard, the descent from brother to brother being immediate. Upon no principle, therefore, can this section help the appellant's case. His estate never vested in the mother, so as for her bastard children to inherit from

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her; nor did it pass through her in the course of descent to the bastard children.

Decree affirmed, with costs.

a The history of the respective disabilities and rights of illegitimate children in different ages and nations, is a subject of curious speculation. The most ancient people of whose laws and political institutions we have any accurate knowledge are the Jews. They appear to make little or no distinction between their legitimate and illegitimate offspring. So, also, the Greeks, in the heroic ages, seem to have regarded them as in every respect equal: but at a subsequent epoch they were stigmatized with various marks of unfavourable distinction. Among the Athenians, the offspring of parents who had contracted marriages, which though valid by the law of nations, were contrary to the policy and the positive institutions of the state, were considered as illegitimate; and all bastards were not only deemed incapable of inheriting from either of their parents, but excluded from public honours and offices, and regarded as aliens to the commonwealth. Thus, the citizen who married a foreign woman at once degraded and denationalized his offspring.[a] The severity of this law was however occasionally mitigated from motives of policy; and when the ranks of the citizens of a Grecian republic became thinned by wars and proscriptions, they were filled up again from this disfranchised class. (*Arist. Politic. l.* 3. *c.* 3. *Id. l.* 6. *c.* 4.)

The Roman law distinguished between the offspring of that concubinage which it tolerated as an inferior species of marriage, and "the spurious brood of adultery, prostitution, and incest." (*Gibbon's Decl. & Fall, &c. c.* 44. *s.* 1.) The former were termed *naturales*; and the latter, *spurii, adulterini, incestuosi, nefarii*, or *sacrilegi*, according as they were respectively the fruit of prostitution, of incest between persons in the direct line of consanguinity, or related in remoter degrees, and of the violation of vows of chastity.

a Leges Atticæ, Sam. Petiti, tit. 4 *de liberis legit. nothis, &c.*

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None of these different classes of illegitimate offspring were stigmatized by civil degradation, or excluded from aspiring to public honours. (*Œuvres de D'Aguesseau, tom. 7. pp.* 384, 385. *Dissert. sur les Bastards.*) But "according to the proud maxims of the republic, a legal marriage could only be contracted by free citizens; an honourable, at least an ingenuous birth, was required for the spouse of a senator: but the blood of kings could never mingle in legitimate nuptials with the blood of a Roman; and the name of Stranger degraded Cleopatra and Berenice to live the *concubines* of Mark Anthony and Titus." (*Gibbon, ubi supra.*) "A concubine, in the strict sense of the civilians, was a woman of servile or plebeian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station, below the honours of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws." (*lb.*) Thus there were several classes of persons who could not lawfully be concubines, either in respect to the infamy of their characters, *ut meretrices;* or in respect to their rank in life, *ut ingenuæ et illustres;* or in respect to their condition as married women, or nuns professed, or as within the prohibited degrees of consanguinity. (*Œuvres de D'Aguesseau, ubi supra.*)

Although bastards were not deprived of any civil rights by the Roman law, and "the outcasts of every family were adopted without reproach as the children of the state," yet they were excluded in the early ages of the republic from all claim to the property of their deceased parents. As the law of the XII Tables only called to the succession the *agnates*, or the persons connected by a line of males of the same *gens* or family; and absolutely disinherited the *cognates* or relations on the side of the mother, bastards could have no claim to the property of their parents by inheritance: not to that of the father *quis neque gentem, neque familiam habent;* nor to that of the mother, because her relations were entirely excluded. It seems, however, that there was no law prohibiting the father from making a provision for his illegitimate children by will, until the time of Constantine, who made some regulations restraining this liberty; which, however, are involved in such obscurity, that the commen-

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tators are not agreed as to their precise nature. J. Godefroy, in his commentary on the Theodosian code, is of the opinion that these regulations annulled such provision by will in favour of bastards wherever the testator left any legitimate children, or father, mother, brothers, or sisters. (*Jac. Godefroy. Com. ad. Cod. Theodo. l.* 1. *De natural. filiis.*) Be this as it may, it is certain that the Emperor Valentinian, A. D. 371, permitted the bastard children of fathers, who had also legitimate offspring, to acquire either by donation or will, one-twelfth part of the paternal property; and in case the father had no legitimate children, or surviving parents, he might dispose in the same manner of one-fourth of his estate in favour of his illegitimate children. (*Cod. Theodos. l.* 1. *De natural. liberis.*) Justinian again permitted those who had both legitimate and illegitimate children to give or bequeath one-twelfth part of their property to the latter; and in case they had no legitimate children, to make the same disposition of a moiety of their estate. (*Novell.* 18. *c.* 5. *Pothier Pandect. in Nov. Ordin. Redact. tom.* 2. *p.* 55.) He afterwards permitted them, in case they had no legitimate children, nor father or mother, "quibus *necessitas est legis* relinquere partem propriæ substantiæ competentem," to leave the whole of their property to their illegitimate offspring; and in case their father or mother survived, the whole, except what the parents were entitled to by law. (*Novell.* 89. *c.* 12.) Justinian also established, for the first time in the Roman jurisprudence, the principle of giving to illegitimate children a legal claim to a portion of their father's property by inheritance *ab intestato*, by providing, that in case the father died intestate, leaving neither wife nor legitimate offspring, his *natural* children and their mother should be entitled to one-sixth part of his estate. (*Œuvres de D'Aguesseau, tom.* 7. 389.) This, however, must be understood strictly of the children born in concubinage, such as the Roman law recognized this domestic relation; and not of "the spurious brood of adultery, prostitution, and incest, to whom, (according to Gibbon,) Justinian *reluctantly* granted the necessary aliments of life:" but from whom it would, in fact, appear that he inhumanly withheld even this provision. "Omnis qui ex complexibus aut nefariis aut incestis, aut dam-

natis processerit, iste neque *naturalis* nominatur, *neque alendus est à parentibus*, neque habebit quoddam ad præsentem legem participium." (*Novell.* 89. *c.* 12. *s.* 6.) It seems, therefore, that this provision for the necessary support of illegitimate children was confined to those termed *naturales*. (*Ib.*)

The stern contempt of the early Roman legislators for the female sex had entirely excluded the *cognates* from the rights of inheritance, "as strangers and aliens." This necessarily prevented even legitimate children from succeeding to their mother; and it is not, therefore, surprising that bastards could claim no part of the maternal estate. When the rigour of this principle was relaxed by the equitable interference of the prætor, his edict called indiscriminately to the succession both the legitimate and illegitimate children of the mother. (*Œuvres de D'Agueseau, tom.* 7. *p.* 391. *Pothier. Pandect. in Nov. Ordin. Redact. tom.* 2. *p.* 557.) This rule was subsequently confirmed by the Tertullian and Orphitian senatus consulta, and continued the law of the empire ever afterwards, except that Justinian engrafted into it an exception unfavourable to the illegitimate children of noble women, *mulieres illustres*. (*Ib.*)

The Roman law had provided various modes by which bastards might be legitimated. 1. The first was by a subsequent marriage of the father and mother; a mode of legitimation first established by Constantine. 2. *Per oblationem curiæ*, a mode introduced by Theodosius and Valentinian, which was when the parent consecrated his child to the service of a city. But this only had the effect of legitimating the children in regard to their father. They had no right to inherit from collaterals, and even their claim to inherit from their father was confined to his property within the city to whose service they were devoted. 3. Adoption alone was declared by the emperor Anastasius to be sufficient to legitimate the natural children of the person adopting them. But this law was abolished by Justin and Justinian. 4. By the last will of the father, confirmed by the emperor. But this only applied to cases where he had no surviving legitimate children, and had some sufficient reason for not having married the mother of his natural children. 5. *Per rescriptum principis*; by a special dispensation from the

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emperor granted upon the petition of the father, who had no legitimate offspring, and whose concubine was dead, or where he had sufficient reasons for not marrying her. 6. By the recognition of the father; as if the father designated one of his natural children as his child in any public or private instrument; this had the effect of legitimating the child thus acknowledged, and all his brothers and sisters by the same mother, upon a legal presumption, that a marriage might have been contracted between the parents. In all these cases, except the 2d, the children thus legitimated were in all respects placed upon the same footing as if born in lawful wedlock. (*Œuvres de D'Aguesseau, tom.* 7. *p.* 393. *and seq. Pothier, Pandect. in Nov. Ord. Redact. tom.* 1. *p.* 27.)

It should be added, that none of these modes of legitimation could apply to the offspring of criminal commerce, *ex damnato coitu;* since they all suppose that the children are born of a concubine with whom the father might lawfully intermarry. (*Œuvres de D'Aguesseau, ubi supra.*)

By the Roman law if a bastard left legitimate children, they became his heirs precisely as if he himself had been legitimate. But if he died, without having been himself legitimated, and without children, his succession was determined by the rule of reciprocity, and his father and mother, &c. succeeded to him, precisely as he would have succeeded to them. If he had been legitimated while living, his succession was regulated in the same manner with that of persons born in lawful wedlock. (*Id. p.* 399.)

By the Canon law, the subject of bastardy was, in general, regulated in the same manner as by the Civil law. But though bastards were capable by the latter of aspiring to all the honours and offices of the State, the former refused them the same privileges in respect to the dignities of the church. The canonists also aimed to exclude them entirely from the succession of their father or mother, but allowed all indiscriminately a right to claim the necessary aliments of life. After legitimation in any of the modes provided by the civil law, such as a subsequent marriage of the parents, &c. they regarded them in the same manner as if born in lawful wedlock. (*Id. p.* 400.

and seq.) It was this rule which they endeavoured to impose upon the English barons at the parliament of Merton in the reign of Henry III. (1 *Bl. Com.* 456.)

The laws of those European countries which have adopted the Roman law as the basis of their municipal jurisprudence, regulate the rights and disabilities of illegitimate children in the same manner as they are determined by the civil and common law. But the Gothic monarchies of Europe adopted from the earliest times a legislation on this subject, in many respects different from that of imperial and papal Rome. Thus, in all the provinces of France, where the *droit coutoumier*, or unwritten law, prevailed, bastards were incapable of inheriting *ab intestato*, except the property of their legitimate children, and the reciprocal right of the husband and wife to succeed to each other according to the title of the civil law, *unde vir et uxor.* This was the universal law of the kingdom, with the exception of the peculiar customs of a few provinces, and the *pays du droit ecrit*, where the Roman law constituted the municipal code. (*Ferriere. Dict. Mot. Bastard. Œuvres de D'Aguesseau, tom.* 7. *pp.* 403. 430. 448.)

They were, also, with the exception of certain local customs, incapable of taking by devise from their parents, except *des donations moderées pour leur alimens et entretiens.* (*Ferriere. Dict. ubi supra. Œuvres de D'Aguesseau, tom.* 7. *p.* 431.)

The king was the heir of all bastards dying without legitimate children, or without having disposed of their property by donation *inter vivos*, or last will and testament, in the same manner as he inherited the estates of *aubains*, or aliens, dying in the kingdom. (*Ib.*) Of the various modes of legitimation known to the civil law, that of France adopted only two, 1. that by a subsequent marriage of the parents, and 2. by authority of the prince. (*Œuvr. de D'Aguesseau, tom.* 7. *p.* 437. The bastard who was legitimated by the subsequent marriage of his parents, was placed upon the same footing as if born in lawful wedlock, as to personal rights, and those of property; but he who was legitimated by authority of the prince, *par lettre du prince*, although capable of aspiring to civil honours and offices, was incapable of inheriting, or transmitting proper-

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ty by inheritance. (*Id. p.* 462.) Such was the law of France before the revolution; but it was greatly modified by the compilers of the new civil code, who retained but one mode of legitimation, that by a subsequent marriage and recognition of the parents. (*Code-Napoléon, art.* 331, 332, 333.) Illegitimate children, legally recognized as such, are entitled, in case their father shall have left legitimate descendants, to one third of the portion to which they would have been entitled had they been legitimate; in case the former shall have left no descendants, but only kindred in the ascending line, or brothers or sisters, to a moiety of the same; and in case the parents shall have left neither descendants, nor kindred in the ascending line, nor brothers or sisters, to three fourths of the same portion. (*Ib. art.* 757.) They have a right to the whole of their parents' property where the latter shall have left no kindred within the degrees of succession. (*Ib. art.* 758.) Their descendants are entitled to the same rights, *jure representationis*. (*Ib. art.* 759.) But bastards are not entitled in any case to succeed to the relations of their parents; (*Ib. art.* 756.) and none of these provisions are applicable to bastards, the fruit of incestuous or adulterous intercourse, who are only entitled to necessary aliments. (*Ib. art.* 762, 763, 764.) The property of bastards leaving no posterity, is inherited by the parents who shall have recognized them. (*Ib. art.* 765.) And in case the parents are deceased, the property received from them, is inherited by the legitimate brothers and sisters of the bastard; and all his other property by his illegitimate brothers and sisters, or their descendants. (*Ib. art.* 766.)

By the law of Scotland, the king succeeds as *ultimus hæres*, to the estates of bastards, and they cannot dispose of their property by will, unless to their lawful issue, without letters of legitimation. But these letters do not enable the bastard to succeed to his natural father, to the exclusion of lawful heirs; for the king cannot, by any prerogative, cut off the private right of third parties. But he may, by a special clause in the letters of legitimation, renounce his right to the bastard's succession, in favour of him who would have been the bastard's heir had he been born in lawful marriage, as such renunciation does

not encroach upon the rights of third parties. (*Erskine's Inst. B. 3. tit. 10. s. 3.*) A bastard is not only excluded, 1. From his father's succession, because the law knows no father who is not marked out by lawful marriage; and, 2. From all heritable succession, whether by the father or mother; because he cannot be pronounced lawful heir by the inquest, *in terms of the brief*; but, also, 3. From the moveable succession of his mother; for, though the mother be known, the bastard is not her lawful child, and legitimacy is implied in all succession deferred by law. But though he cannot succeed *jure sanguinis*, he may succeed *by destination*, where he is specially called to the succession by an entail or testament. (*Ib. s. 4.*)

The laws of England respecting illegitimate children, are too well known to render any particular account of them necessary in this place. *Vide* 1 *Bl. Comm.* 454. *et seq. Co. Litt. by Hargr. & Butler*, 3 *b.* note 1. *Id.* 123. *a.* note 8. *Id.* 123. *b.* note 1, 2. *Id.* 243. *b.* note 2. *Id.* 244. *a.* note 1, 2. *Id.* 244. *b.* note 1.

(Local Law.)

Perkins *et al.* v. Ramsey *et al.*

The following entry is invalid for want of that certainty and precision required by law: "William Perkins and William Hoy, enter 6,714 acres of land on a treasury warrant, No. 10,692, to join Lawrence Thompson and James M'Millan's entry of 1,000 acres that is laid on the adjoining ridge between Spencer's creek and Hinguton's fork of Licking on the east, and to run east and south for quantity." The entry referred to in the foregoing was as follows: "9th of December, 1782, Lawrence Thompson and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Kingston's fork of Licking and Spencer's creek, *a west branch of said fork*, to include a large pond in the centre of a square, and a white oak tree marked X, also an elm tree marked V S, near the side of the pond."

This cause was argued by Mr. *B. Hardin*, for the appellants, and by Mr. *Trimble*, for the respondents. *Feb. 17th.*

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Perkins v. Ramsey. *March 6th.*

Mr. Justice TODD delivered the opinion of the Court. This is an appeal from the decree of the seventh Circuit Court in the district of Kentucky, and is a controversy between conflicting claims to land originating under the land law of Virginia.

The respondents relying on their elder legal titles, and denying the validity of the entries, under which the appellants derive their titles, it is necessary to examine those entries only.

The entry under which the appellants derive title is in the following words, as it stands amended, viz. "William Perkins and William Hoy enter 6,714 acres of land on treasury warrant No. 10,692, to join Lawrence Thompson and James M'Millan's entry of 1,000 acres that is laid on the dividing ridge, between Spencer's creek and Hingston's fork of Licking, on the east, and to run east and south, for quantity."

The entry referred to in the foregoing one, is in the following words, viz: "9th of December, 1782, Lawrence Thompson and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking and Spencer's creek, *a west branch of said fork*, to include a large pond in the centre of a square, and a white oak tree marked X, also, an elm tree marked V S, near the side of the pond."

On reading this last entry, the impression would be strong, that the dividing ridge, Spencer's creek, and the large pond, were all to be found on the west side of Hingston's fork of Licking: a subsequent

locator, or those desirous of ascertaining the land embraced by this entry, on making inquiry for the objects called for, would be informed that Spencer's creek is not a water of Hingston's fork; but is a water of Slate creek, and lies on the east, and not on the west side of Hingston. Each of those creeks was, at the date of this entry, generally known by their respective names. There is, then, in this entry a *mistake* in describing Spencer's creek as a west branch of Hingston's fork. If this mistake can be corrected according to legal principles, and well settled rules of construing entries, it should be done, if by the correction the entry can be sustained. It is stated to be a rule of construction adopted in the Courts of Kentucky, that where there are repugnant, false or mistaken calls in an entry, they may be rejected. Admitting the correctness of this rule, the call for Spencer's creek as being a west branch of Hingston's fork, is not a repugnant, but is a mistaken one. This mistake being corrected, the entry would then read, "Lawrence Thompson and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, on the dividing ridge between Hingston's fork of Licking, and Spencer's creek, to include a large pond in the centre of a square, and a white oak tree marked X, also, an elm tree marked VS, near the side of the pond." Those who were acquainted with Hingston's fork, and Spencer's creek, would know, and the connected platt before the Court shows, that there is a dividing ridge extending in a northern and southern direction, between those water courses. A subsequent locator might

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thus have ascertained three of the objects called for in this entry, viz. the dividing ridge, Hingston's fork, and Spencer's creek; but the large pond and marked trees are still wanting to ascertain the specialty and precision of this entry. The most diligent inquiry and laborious research would not enable him to find them, on, or near *this* dividing ridge. Here another false call or description is discovered. How is this to be corrected? It is contended, that Slate creek must be substituted for Hingston's fork, by doing which, all mistakes will be corrected, and every object called for in the entry may be easily found, and correctly ascertained. Waiving for the present all objection to this substitution, let it be examined how the entry would then stand. The description would then be "on the dividing ridge between Slate creek and Spencer's creek, a west branch thereof, to include a large pond in the centre of a square, and a white oak tree marked X; also, an elm tree marked V S, near the side of the pond." With this correction, a subsequent locator being placed at the mouth of Spencer's creek, would naturally look for the dividing ridge to conduct him to the pond, and marked trees. The connected platt exhibits three ridges, one extending in a northern direction, between Slate, and a branch of Spencer's creek; a second, extending westwardly up Spencer's creek, on the south side thereof, which is a dividing ridge between Spencer's creek and Greenbrier creek, also a water of Slate; and a third, extending westwardly up Greenbrier on the south side thereof, which is a dividing ridge between Greenbrier and Brush

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creek, also a water of Slate. Which of these would he decide to be the dividing ridge between Spencer's creek, and Slate; or can either of them be properly so called? It is contended on the part of the appellants, that the ridge on the upper, or south side of Spencer's creek would, in the general, and common acceptation of men, be considered as the proper one. It may be admitted, that in many, perhaps in most cases, a call for the dividing ridge between two streams would generally be considered as designating that point *above* the one, and adjoining the other; but it must also be admitted, that in some cases it would not be so considered; it would depend on the direction or course of the streams, and the manner in which they are united with each other. If the general course of the one was south, and the other north, and the other running south, should turn east to form the junction, and the one running north should continue its course, then the land below the junction, would by every person be considered as dividing the one stream from the other. Take as an example that branch of Spencer's Creek, called Harper's Fork; suppose it the main stream, and that it formed a junction with Slate Creek instead of Spencer's Creek, could a doubt exist that the land on the *lower* side was the dividing ridge between that stream and Slate Creek? The dividing ridge on the south side of Spencer's Creek, is, in truth and in fact, a dividing ridge between that creek and Green-brier, another water of Slate, running nearly parallel with Spencers's Creek, and forming a junction with Slate above it. The same

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fact exists as to the dividing ridge between Green-brier and Brush Creek. The ridge, then, extending northwardly from the mouth of Spencer's Creek might, with equal probability, be pursued as either of the others; it would lead to a pond, as designated on the connected platt 32. It is true, this pond is not proved to be a large one, and a subsequent locator on a view of it might conclude it did not answer the description of that called for in the entry. If he returned and pursued the ridge between Green-brier and Brush Creek, he would be conducted to a pond, designated on the connected platt 38. This also is not a large pond, and may be considered as not answering the description. But supposing he should pursue the ridge on the south side of Spencer's Creek, would it conduct him certainly to the pond No. 1., as designated on the connected platt? We think it very doubtful, from the proofs in the cause. It is not situate on the dividing ridge, but is nearly surrounded by the drains and branches of Green-brier, is from 50 to 80 poles distant from the ridge, was nearly surrounded by high, strong, and thick canes; and, although from the testimony, there appears to have been a good deal of conversation among the residents at Boonesborough respecting a large pond in this section of country, yet its precise situation was known only to a few, among some of whom existed an agreement to conceal their knowledge of it, and many of the residents at that place and its vicinity knew not, nor had heard any thing respecting it: to which may be added, that the pond designated on the connected platt 37., is a large

pond, was also known to many, and possibly may have been the one spoken of in some of the general and loose conversations at Boonesborough; and it may be further observed, that the residents at Strode's and M'Gee's stations, (which were the nearest ones,) as well as many others, who were conversant in that section of country, had never seen, and did not know of, the pond No. 1. until a considerable time after the date of the entry. The Court is, therefore, of opinion, that this pond was not so generally known, or could be so readily found, as to support and uphold this entry; and that it would be requiring more than ordinary and reasonable diligence to traverse and search all the dividing ridges represented on the connected platt.

But we are not satisfied that, according to the legal principles or well settled rules for construing entries, Slate creek, can be substituted for Hingston's fork: on the contrary, we believe it would be *making*, rather than *construing* an entry. No case has been produced, where this has been permitted, and it is believed none such exists. The counsel for the appellants contends, that as from the proofs in the cause, it appears that Slate creek was by many supposed to be Hingston, this circumstance would authorize such substitution; to this it may be answered, that this mistake existed among the hunters and locators at Boonesborough *only*, and that among them, there were several who knew Slate creek by its appropriate name; to which it may be added, that all the hunters and locators at Strode's and M'Gee's stations, as well as many others, also knew Slate creek, and that it was

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not a water of Hingston's fork; so that *a majority* of those conversant in that section of country did not labour under the mistake. We are therefore of opinion, that it would be extending the rules of construction too far to make this substitution, in support of the mistake of the few, against the knowledge of the majority; if a substitution could be permitted in any case. We are farther of opinion, that Hingston's fork, was of more general notoriety than any of those streams, and ought not to be disregarded in construing this entry; that it is one of the prominent calls to ascertain its situation; and that a subsequent locator having arrived at Hingston's fork, and finding the pond designated on the platt 37, which is proved to have been known to many, and is little inferior in size to the pond 1, might rationally conclude, that the locator of the entry under consideration, had mistaken some western branch of Hingston, for Spencer's creek; thus situated, he would conjecture, that an entry containing such incorrect, mistaken, or false calls, and requiring so much diligence and labour, was so doubtful and uncertain, as to induce him to abandon further research. This entry, therefore, from a full view of all the proofs and circumstances, is deemed invalid, for want of that certainty and precision required by law.

In accordance with this opinion, is the decision of the Court of Appeals of the State of Kentucky, in the suit of Dunleary against Reed and others, wherein the same entry was examined upon substantially the same evidence.

Decree affirmed with costs.

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Mandeville v. Welch.

(Common Law.)

Mandeville v. Welch.

5wh277 471 47
5wh277 149 302
5wh277 641 618
5wh277 661 115
5wh277 721 328
721 613
5wh277 891 83

Bills of exchange and negotiable promissory notes, are distinguished from all other parol contracts by the circumstance that they are *prima facie* evidence of valuable consideration, both between the original parties, and against third persons.

Where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights.

It makes no difference, in this respect, whether the assignment be good at law, or in equity.

But this doctrine only applies to cases where the entire chose in action has been assigned, and not to a partial assignment.

Error to the Circuit Court for the district of Columbia. This was an action of covenant brought by the plaintiff, James Welch, for the use of Allen Prior, against the defendant Mandeville, one of the firm of Mandeville & Jamesson, for the breach of certain articles of agreement set forth in the declaration. Several pleas were pleaded by the defendant; but as the opinion of this Court turned altogether upon the fourth set of pleadings, on which issue was joined, and at the trial a bill of exceptions taken, it is unnecessary to state the other pleadings.

The fourth plea alleged a release of the cause of action by the plaintiff before the commencement of the present suit. The plaintiff replied, in substance, that Welch being indebted to Allen Prior, in a sum exceeding 8,707 dollars and 9 cents, and Mandeville

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& Jamesson being indebted to Welch by virtue of the covenant in the declaration mentioned, in the same sum of 8,707 dollars and 9 cents, Welch did, in the year 1799, appropriate, assign, and transfer to Prior, by a good and sufficient assignment in equity, the same debt due by reason of the same covenant, of which appropriation and assignment to the use and benefit of Prior, Mandeville, afterwards, in 1799, had notice; that the present suit was brought for the sole use and benefit of Prior, and Mandeville, at its commencement, had notice thereof, and knew the same suit was depending for the use and benefit of Prior at the date of the pretended release; that the release was obtained without the knowledge, consent, or approbation of Prior, or of his attorney in Court; and that Welch had no authority from Prior or his attorney, to execute the release, which was known to Mandeville at the time of the release; and that the release was made with the intent to defraud Prior, and to deprive him of the benefit of this suit. To this replication there was a rejoinder and issue, upon which the parties went to trial.

At the trial, the plaintiff, to prove that Welch did transfer and assign to Prior, by a good and sufficient assignment in equity, the debt in the replication mentioned, gave in evidence to the jury the articles of agreement in the declaration mentioned, and sundry endorsements of payments thereon, and a memorandum also thereon, dated the 1st of January, 1798, and signed by Welch, stating that there then remained owing to him, on the articles payable at the times therein mentioned, the sum of 8,707 dollars and 9

cents. The plaintiff further offered three bills of exchange drawn by Welch, in favour of Prior, upon Mandeville and Jamesson, dated on the 7th of September, 1799, each for 2,500 dollars, payable to Prior or his order: one on the 24th of November, 1800, another on the same day and month, 1801, and the third on the same day and month, 1803, being the respective times at which certain instalments for like sums would become due on the articles of agreement stated in the declaration. Each of these bills purported to be "for value received" of Prior, and were directed to be charged "to account as advised." The plaintiff farther offered in evidence to the jury an account rendered to Welch by Mandeville & Jamesson, dated the 31st of January, 1798, stating the balance of 8,707 dollars and 9 cents, due to Welch, and payable by instalments in the manner mentioned in the articles of agreement; and proved that this account had been delivered to Prior by Welch.

The defendant then gave in evidence the bill and proceedings in a suit in Chancery in Fairfax county, by Prior, against Welch & Mandeville & Jamesson, (excepting the answers of the latter,) which suit was brought to recover the amount of the three bills of exchange from Mandeville & Jamesson, as debtors of Welch, and was discontinued by the plaintiff, Prior, after the answer of Welch had come in, denying that Prior was owner of the bills, and asserting that Prior held them merely as his agent, and for his use. And the defendant further proved, that Welch had never authorized the present suit to

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be brought, unless the circumstances above stated would have given Prior authority to institute the same.

The defendant then prayed the Court to instruct the jury, that if from the evidence so given, they should be of opinion, that the sums for which the bills were drawn amounted to less than the sums payable by Mandeville & Jamesson to Welch, under the covenant, and were known to be less by Welch, then Prior is not such an assignee of the covenant as would authorize him to sustain this suit in the name of Welch. Which instruction the Court gave; but further instructed the jury, that if they should be of opinion, from the evidence, that the bills were drawn for the full and valuable consideration expressed on the face of them, paid by Prior to Welch, and if there was no other evidence than what is before stated, they ought to infer from the evidence, that Prior was, and is such an assignee of the right of action upon the covenant as authorized him to sustain this action in the name of Welch's administrator (Welch having died pending the proceedings, and his administrator having been made party to the suit) for the whole debt due by the covenant at the time of Welch's delivering the account above stated to Prior; and further, that the bills were *prima facie* evidence of such value having been paid by Prior to Welsh. The jury found a verdict for the plaintiff under this instruction; and the cause was brought before this Court by a writ of error, to revise this among other supposed errors assigned upon the record.

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Mandeville v. Welch. March 3d.

Mr. *Swann*, and Mr. *Taylor*, for the plaintiffs in error, argued, 1. That the Court below erred in its instruction to the jury that the words "value received" were evidence against Mandeville & Jamesson, that money had been actually paid by Prior to Welch, or the bills. They do not claim under the bills, nor under Welch as the drawer. They claim as assignees of the fund on which the bills were drawn. In the case of Evans v. Beatty,[a] Lord Ellenborough held, that on a guaranty to pay for goods sold to a third person, the declarations of the latter were not evidence to charge the person giving the guaranty; because there might be collusion between the third person and the plaintiff. So in this case, if the defendant proved an assignment to him, Welch's declaration that he had previously assigned to the plaintiff, would not be admissible, and his declaration *in writing* cannot have any greater effect. 2. It was not the intention of Welch, and of Prior, that the whole covenant should be assigned, nor does the law imply such an assignment. The bills are general, not payable out of any particular fund, and there is no proof of any agreement between Welch and Prior, that the latter should have a lien on the funds in the hands of Mandeville & Jamesson. The legal consequence of the decision of the Court below is, that the drawing of a bill of exchange amounts, *per se*, to an assignment in law of the funds of the drawer in the hands of the drawee, so as to authorize a suit in the name of the drawer, without his consent, against

[a] 5 *Esp. N. P. C.* 26.

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the drawee, and when recourse might be had to the former. There is no case to support the idea that the drawing of a bill under any circumstances, will amount to an assignment at law. Cases, indeed, have occurred, where, under peculiar circumstances, a Court of Equity has considered the drawing of a bill as giving to the payee a superior claim or equitable lien. Thus, in the case of Yeates v. Groves,[a] the creditor surrendered a security he held, under an express agreement that he should be paid out of the money to arise from a particular specified fund, on which the bill was drawn, and the drawer became bankrupt. But the proposition, that the drawing of a bill on a specific fund would, *per se*, have created such a lien, is repelled by Lord Thurlow. It would be highly impolitic to consider the drawing of a bill, under any circumstances, as amounting to an assignment, or creating a lien, in a Court of law. These questions generally arise on the bankruptcy of the drawer. His general creditors have an interest, and ought to be heard. They cannot be made parties to a suit at law.

Mr. *Jones* and Mr. *Lee*, contra, insisted, 1. That bills and negotiable notes expressing upon their face "value received," are evidence of that fact, both as between the original parties, and against third persons. 2. The facts and circumstances of the case establish by legal inference, that the articles of agreement were wholly assigned in equity. The bills

[a] 1 *Ves. Jun.* 280.

being *prima facie* evidence of an equivalent advance by Prior, the possession by him of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamisson, furnish a legal presumption that both were delivered as security for the payment of the advance. He thus acquired a lien on them similar to that acquired by the delivery of title deeds as security for a debt, which lien has always been deemed by Courts of Equity equivalent to a mortgage.[a] So, also, the deposit of a note or bill, as security for a debt, entitles the creditor to enforce his lien in equity.[b] But supposing this position not to be correct, still it is contended, that there was here a partial lien or appropriation of the debt due from Mandeville & Jamesson under the articles, to the extent of the sums due on the bills, which is sufficient to authorize Prior to maintain this action. The drawing of a bill of exchange is, in itself, an assignment by the drawer to the payee of the money due from the drawee. The acceptance is not necessary to make the assignment complete, but only to give an action against the drawee in the name of the payee.[c] In the case of Clark v. Adair, cited by Mr. Justice Buller in Masters v. Miller,[d] it was determined

a Sweas v. Camelford, 1 *Vez. Jun.* 235. Walwyn v. Sheppard's Assignees, 4 *Ves.* 119. Jones v. Gibbons, 9 *Ves.* 411. *Ex parte* Langston, *Rose's Rep.* 26. Russel v. Russel, 1 *Bro. Ch. Cas.* 269.

b *Ex parte* Crossbey, 3 *Bro. Ch. Cas.* 237. *Ex parte* Byas, 1 *Atk.* 148.

c Gibson v. Minet, 1 *H. Bl.* 569. 602. Tatlock v. Harris, 3 *T. R.* 174.

d 4 *T. R.* 343.

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that an unaccepted bill was such an assignment as entitled the payee to the money. In Yeates v. Groves,[1] an order to pay out of a particular fund, though not accepted, was considered such a transfer as to prevent the assignee of the party who became bankrupt after drawing the order, from claiming the fund on which the order was drawn.

March 7th.

Mr. Justice STORY delivered the opinion of the Court. Two questions arise upon the instruction to the jury: 1. Whether the bills were *prima facie* evidence that value had been paid for them by Prior to Welch? 2. Whether, under all the circumstances of the case, Prior was an assignee in equity entitled to maintain the present action?

Bills and negotiable notes are *prima facie* evidence of value received, both between the original parties and third persons.

Upon the first point, we are of opinion, that the law was correctly laid down by the Court below. The argument of the defendant's counsel admits, that where a bill imports on its face to be for "value received," it is *prima facie* evidence of that fact between the original parties; but it is stated, that it is not evidence of the fact against third persons. We know of no such distinction. In all cases where the bill can be used as evidence either against the parties, or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. In this respect, bills of exchange, and negotiable notes, are

[1] 1 *Vez. Jun.* 280.

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distinguished from all other parol contracts, by authorities which are not now to be questioned.[a]

The assignor of a chose in action cannot interfere in a suit brought by the assignee so as to defeat his rights.

The other question requires more consideration, though it does not in our judgment present any intrinsic difficulty. It has been long since settled, that where a chose in action is assigned by the owner, he shall not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference whether the assignment be good at law, or in equity only. This doctrine was fully recognized by this Court when this case was formerly before us.[b] It was then applied to a case, where the whole chose in action was alleged to have been assigned; and it was certainly then supposed that the doctrine in Courts of law had never been pressed to a greater extent. We are now called upon to press it still farther, so as to embrace cases of partial assignments of choses in action.

It is contended on behalf of the plaintiff, in the first place, that the facts of this case establish by legal inference, that the articles of agreement were entirely assigned in equity to the plaintiff. If this ground fails, it is in the next place contended, that an assignment was made of the debt due by the articles to the extent of 7,500 dollars, the amount of the bills drawn on Mandeville & Jamesson, and that

a *Chitty on Bills*, (2d edit.) 12. 62. 1 *Wils. Rep.* 189. *Burr.* 1516. *Salk.* 25. 1 *Bos. & Pull.* 651.

b Welch v. Mandeville, 1 *Wheat. Rep.* 235.

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Equitable mortgage created by a deposit of title deeds.

this, *per se*, authorizes Prior to sustain the present action.

In support of the first position, it is argued, that the bills being *prima facie* evidence of an equivalent advance made by Prior, the possession by the latter of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamesson, afford a legal presumption that the articles and account were delivered to him as security for the payment of such advance, and thereby he acquired a lien on them like that acquired by the delivery of title deeds as security for a debt, which lien has always been deemed to be equivalent to an equitable mortgage. It may be admitted, that according to the course of the authorities in England, and as applicable to the state of land titles there, a deposit of title deeds does, in the cases alluded to, create a lien, which will be recognized as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title deeds. It may also be admitted, that a deposit of a note not negotiable, as security for a debt, will entitle the creditor, after notice to the maker, to enforce in equity his lien against the depositor, and his assignees in bankruptcy. Such was the case cited at the bar from Atkyn's Reports.[a] But in cases of this nature, the doctrine proceeds upon the supposition, that the deposit is clearly established to have been made as *security* for the debt; and not upon the ground that the mere fact of a deposit unexplained affords such proof. In

[a] *Ex parte* Byas, 1 *Atk.* 148.

the case at the bar, it was not proved that the articles were delivered by Welch to Prior at all, much less that they were delivered as security for the bills. The delivery of the account is certainly an equivocal act, and might have been as a voucher of the right of Welch to draw on Mandeville & Jamesson. There is this farther deficiency in the proof, that the bills do not appear ever to have been presented to the drawees for acceptance, which not only rebuts the presumption from the face of the bills that they were received for value, since a *bona fide* holder could not be supposed guilty of such fatal laches; but draws after it the auxiliary presumption, that they were in the hands of Prior as agent, and, therefore, that he had not any assignment of the articles as security. And it may be added, that the suit commenced in Chancery by Prior, for this very debt, and, afterwards, discontinued, does not assert any assigned title in himself, but proceeds against Mandeville & Jamesson, as the mere debtors of Welch. Under such circumstances, this Court cannot say that the instruction of the Circuit Court was correct, that the jury ought to infer, that Prior was an assignee, entitled to sue for the whole debt due upon the articles.

A bill of exchange is an assignment to the payee, of the debt due from the drawee to the drawer.

The ground, then, that there was a deposit of the articles as collateral security, failing, we are next led to examine the position of the defendant's counsel, that there was a partial lien or appropriation of the debt due from Mandeville & Jamesson, under the articles to the extent of the sum due on the bills, which is equivalent to an equitable assignment of so

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much of the debt. It is said, that a bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true, where the bill has been accepted, whether it be drawn on general funds, or a specific fund, and whether the bill be in its own nature negotiable or not; for in such a case, the acceptor, by his assent, binds, and appropriated the funds for the use of the payee. And to this effect are the authorities cited at the bar.[a] In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hand.

But this principle does not apply to a partial assignment of the fund.

But where the order is drawn either on a general, or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken

a Yeates v. Groves, 1 *Ves.* jun. 280. Gibson v. Minet, per Eyre, C. J. 1 *H. Bl.* 569. 602. Tatlock v. Harris, 3 *T. R.* 174.

into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. So that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But, in the present case, there is no proof of any presentment of the bills, much less of any acceptance by the defendant to establish even a partial assignment of the debt. And if there were, it would still be necessary to show that there was an assignment of the articles as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the pleadings, the plaintiff undertakes to establish an assignment of the whole debt due by the articles; and if he fails in this, there is an end to his recovery. So that, in whatever view we contemplate the facts of this case, or the law applicable to it, the plaintiff has not shown any sufficient title to sustain his replication to the fourth plea.

Several other objections have been taken at the bar to the plaintiff's right of recovery, which under other circumstances would have deserved serious consideration; but, as upon the merits of the case, as they are apparent upon the record, the judgment of this Court is decidedly against the plaintiff, it is unnecessary to give any opinion upon those objections.

Judgment reversed.

JUDGMENT. This cause came on to be heard on

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the transcript of the record of the Circuit Court for the District of Columbia in the county of Alexandria, and was argued by counsel. On consideration whereof, this Court is of opinion that the said Circuit Court erred in instructing the jury, "that if they should be of opinion, from the evidence, that the said bills were drawn for the full and valuable consideration expressed on the face of them, paid by the said Prior to the said Welch, and if there be no other evidence than what is herein before stated, they ought to infer from the said evidence, that the said Prior was, and is such an assignee of the right of action upon the covenant aforesaid, as authorizes him to sustain the action in the name of the said Welch's administrator for the whole debt due by the said covenant, at the time of the said Welch's delivering the said account to the said Prior." It is, therefore, ADJUDGED AND ORDERED, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled. And it is further ORDERED, that the said cause be remanded to the the said Circuit Court, with directions to issue a *venire facias de novo*.

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Wallace v. Anderson.

(PRACTICE.)

WALLACE v. ANDERSON.

An information for a *quo warranto*, to try the title to an office, cannot be maintained but at the instance of the Government; and the consent of parties will not give jurisdiction in such a case.

ERROR to the Circuit Court of Ohio.

This was an information for a *quo warranto*, brought to try the title of the defendant to the office of principal surveyor of the Virginia military bounty lands north of the river Ohio, and between the rivers Scioto and Little Miami. The defendant had been appointed to the office by the State of Virginia, and continued to exercise its duties until the year 1818, during all which time his official acts were recognised by the United States. In that year he was removed by the Governor and Council of Virginia, and the plaintiff appointed in his place. The writ was brought, by consent of parties, to try the title to the office, waiving all questions of form, and of jurisdiction. Judgment was given in the Court below for the defendant, and the cause was brought by writ of error to this Court.

The cause was argued by Mr. *Hardin*, for the plaintiff, and by the *Attorney-General* and Mr. *Scott*, for the defendant. But as the cause was dismissed for want of jurisdiction, it is deemed unnecessary to insert the argument. *March 6th.*

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Wallace v. Anderson.
March 8th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court, that a writ of *quo warranto* could not be maintained except at the instance of the Government, and as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor, or of the person claiming to exercise the office in question. The information must, therefore, be dismissed.

Judgment reversed.

JUDGMENT. This cause came on to be heard on the transcript of the record of the Circuit Court for the district of Ohio, and was argued by counsel. On consideration whereof, this Court is of opinion, that no writ of *quo warranto* can be maintained, but at the instance of the Government; and as this is a writ issued by an individual without the authority of Government, it is the opinion of this Court, that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise the office, to try the title to which, the writ is brought. It is, therefore, the opinion of this Court, that the judgment of the Circuit Court ought to be reversed, and the cause remanded to that Court, with directions to dismiss the information because it is not filed at the instance of the United States.

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Polk's Lessee v. Wendell.

(Local Law.)

Polk's Lessee v. Wendell *et al.*

5wh293
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5wh293
193f 925
93f 926

There are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law.

A grant raises a presumption that every prerequisite to its issuing was complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void.

Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of lands: *Held*, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies; but that in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in Court, or inspected under a commission, or the keeper of the document examined as a witness, from which the Court might ascertain the fact of the non-existence of the contested entries.

In such a case, certificates from the Secretary's office of North Carolina, introduced to prove that on the entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the name of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence, that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible.

It seems, that, whether a grant be absolutely void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity as against an innocent purchaser without notice.

Error to the Circuit Court of West Tennessee.

This was an action of ejectment, for five thousand

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acres of land, in the State of Tennessee, granted by the Governor of North Carolina, to Polk, the lessor of the plaintiff, on the 6th of May, 1800, on a warrant from John Armstrong's office, dated May 25th, 1784. The defendants, who were proved to be in possession of part of this tract, claimed title under a grant from the Governor of North Carolina to John Sevier, for twenty-five thousand and sixty acres, bearing date on the 28th of August, 1795. This grant appears by the annexed certificate of survey to be founded on forty land warrants of six hundred and forty acres each, numbered from 1631 to 1676, and surveyed in one entire tract. The land in dispute was proved to lie within the lines of Sevier's grant. The plaintiff having proved that John Carter was entry-taker of Washington county until February 28th, 1780, and that Landon Carter was then appointed, offered in evidence an office copy of an abstract (marked K. in the transcript) of the warrants, on which Sevier's survey and grant were founded; the original book of entries being destroyed. From this copy it appeared, that all the warrants were issued from the Washington county office, in April or May, 1780, to the surveyor of Sullivan county, and purported to be founded on entries which bore date on the 16th of September, 1779. They were all signed "Landon Carter, Entry-taker." He also produced, and offered to give in evidence, office copies of warrants from the same office, (marked H. and L. in the transcript,) of the same dates and numbers, but to different persons, and for different quantities of land. These warrants ap-

peared to be issued by John Carter; and were offered, like Seveir's warrants, for the purpose of showing that the latter were spurious, and, consequently, that Seveir's grant was void. The plaintiff also offered in evidence a grant to Seveir for 32,000 acres, dated 27th of November, 1795, which purported to be founded on thirty-six warrants, all of them except the two first on alleged entries, dated on the same 16th of September, 1779. He also offered to prove, that the two first warrants had been satisfied by prior grants, and in respect to the others, that warrants for the same numbers issued to other persons, and were recognised in the abstract of Carter's entry book, but none of Seveir's. The plaintiff also offered to prove, that the warrants and locations of Seveir had been insinuated, in 1794 or 1795, into the entry taker's office without his knowledge; that they were rejected by the entry-taker as spurious; and that the locations were in Seveir's hand-writing. The plaintiff also offered to give in evidence a report to the legislature of Tennessee, of November 8th, 1803, declaring all Seveir's warrants to be fraudulent fabrications. All this testimony was overruled and rejected by the Court, to which the plaintiff excepted. A verdict was taken, and judgment rendered for the defendants, and the cause was brought by writ of error to this Court.

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Mr. *Harper*, and Mr. *Gaston*, for the plaintiff, argued, 1. That it was competent for the plaintiff to show, that no entries had been made in the land office of North Carolina, and that, therefore, the Governor had no power to issue the grant. The act of 1777, c. 1. s. 3. makes the entry the first essential

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and indispensable requisite to obtaining a title to vacant land. The 5th section points out the difference between location, entry, and warrant. The entries are the foundation of the claim, and are all to be numbered in the order in which they are made. The 9th section declares every right obtained in any other manner, "utterly void." This section follows the directions in regard to the entry, and makes a valid entry the one thing needful. In the construction of this statute, it has been settled in the Courts of North Carolina, that no *legal* title is created until the grant; and that the elder grant, though founded on a junior entry, is, at law, to be preferred to a junior grant on an elder title; that an equitable interest is acquired by the first entry, which is to be enforced as other equitable titles are enforced. It is also settled, that when a grant issues, it furnishes sufficient *prima facie* evidence, that all the prerequisites of the law have been complied with; and that it cannot be avoided by showing irregularities in the conduct of the officers who superintended the progress of the claim from the entry to the grant. There have been loose dicta, unsatisfactory and inconclusive reasonings, from which other inferences have been drawn: But it is denied, that it ever was law in North Carolina, that a grant should be good if it could be clearly shown that it was not founded on an entry, but was wholly fraudulent. It would have been impossible to pronounce such a decision without a violation of the plain, strong words of the 9th section of the act, "shall be deemed, and are hereby declared utterly void." Such a decision too,

would have been inconsistent with the first principles of the common law, fraud being the object of its peculiar abhorrence, and contaminating every act.[a] Courts of common law have a concurrent jurisdiction with Courts of Equity, in all cases of frauds.[b] It is impossible that a grant, begun and ended in fraud, where there has been no claim entered, nor purchase made from the State, should be valid. If, however, a doubt could exist in the case of a grant issuing before the year 1789, assuredly none can be entertained on a grant made by the governor of North Carolina since the cession of the territory, which now forms the State of Tennessee, to the United States. By the act of cession, the sovereignty and domain are relinquished by North Carolina, and a mere ministerial power is reserved to the Governor of that State to perfect grants, "where entries have been made agreeably to law, and the titles not perfected." The State has no longer authority to dispose of the lands. She is no longer their proprietor. The Governor has a mere naked power, unconnected with an interest, to make grants where entries have been previously made. A grant issued where no entry has been made, is an act wholly unsupported by the power, and cannot possibly transfer an interest. The whole question has, in fact, been already settled by the reasoning and decision of this Court, when this case was formerly before it.[c]

a Fermor's case, 3 *Co. Rep.* 77.

b 3 *Bl. Com.* 431. Bates v. Graves, 2 *Ves.* jun. 295. 8 *Ves.* jun. 283. Arthur Legat's case, 10 *Co. Rep.* 109.

c 9 *Cranch*, 87.

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2. The evidence offered by the plaintiff was proper in itself, and relevant to show, that no entries had been made, prior to the cession, authorizing the Governor of North Carolina to make a grant to Sevier. The best evidence was offered of the pretended warrant on which his grant was founded, and, also, to show, that other warrants existed of precisely the same numbers. This alone raised a presumption, that one or the other must have been spurious. According to the act of 1777, c. 1. s. 5. there could not possibly be two sets of entries of the same numbers, without the most extraordinary negligence. This testimony ought to have gone to the jury, even if there had been no other. It should have been left to them to decide which of the two sets of warrants was spurious under the peculiar circumstances of the case. But it was supported by corroborating evidence of great weight; by the abstract of Carter's entries. The competency of this evidence may be maintained both on the ground of common law principles, and on special enactments of the local legislature. It is the best which the nature of the case admits of. Works compiled by authority and order of the government of the country, on public occasions, and on subjects of public interest, are recognized as authentic documents in courts of justice, and admitted as evidence in matters of private right. Such are, in England, the celebrated Doomsday Book; the Survey of the King's Ports; the *Valor Beneficiorum*;[a] copies of Surveys of Church and Crown Lands;

[a] *Gilb. Law of Evid.* 69. *Phillips on Evid.* 303, 304.

kept in unsuspected repositories.[a] The day book of a prison, containing a narrative of the transactions there, is proof of the time of a prisoner's commitment.[b] So, terriers are evidence of manorial boundaries, either when found in the regular repositories, or in places where the custody can be satisfactorily explained.[c] But, in this case, there are positive statutes of the legislature of Tennessee, by which this book of entries and copies from it are made evidence.[d] In addition to all this, was the parol evidence. The introduction of these locations and warrants into the office in 1795, in a secret manner, betrayed a consciousness that they had not before existed there. This accumulation of proof fully established the plaintiff's allegation; or, at all events, it had a tendency to establish it, and its sufficiency ought to have been left to the jury. As to the legislative report; there is some reason to believe, that the legislature of Tennessee intended, by their act of 1807, c. 82., to make it evidence. At least it might have been proper evidence to bring home notice to the defendants, prior to their purchase.

The *Attorney General*, and Mr. *Williams*, contra, insisted, 1. That the proceedings on which a grant issues, are to be presumed to be correct. They constitute a question between the State and the grantee

a *Phillips*, 304. 11 *East*, 234. 1 *Maul. & Selw.* 294.
b King v. Aikley, cited *Phillips*, 313.
c *Phillips*, 316, 317.
d *Laws of Tenn.* 261.

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only. Between private parties, evidence *dehors* the patent is wholly inadmissible at law.[a] 2. The testimony offered in this case was clearly inadmissible upon the principles of the former decision of this Court; in which, it may be added, that the Court has gone farther than the local Courts in permitting inquiries into facts occurring prior to the issuing of a grant.[b] The Court below gave no opinion upon any specific evidence, but on the general question, and rejected the whole testimony, which was offered to prove that the warrants were forged. But in order to prove this, the production of the warrants was indispensable, and no inferior proof ought to have been received. The abstract is defective, because it is only of a part of a record, when it ought to be of the whole, and so certified. It is a part only of a copy of a copy. The attempt to infer the spuriousness of the warrants from the identity of the numbers, was justly repelled, because the same numbers are often given to many warrants, and it can seldom be shown on what entry the grant issued. The report of the select committee of the legislature was also inadmissible as evidence; both because there is no proof that it was ever acted on by the house, and because the State of Tennessee had, at the time, no authority over the lands, North Carolina having retained the right of completing titles originating before the cession. 3. But, even supposing the grant under

a Spalding v. Reeder, *Maryl. Rep.* 187. 1 *Hayw.* 106. *Id.* 135. *Id.* 359. *Id.* 497. 3 *Hayw.* 215. 1 *Tenn. Rep.* 318. 2 *Tenn. Rep.* 25. *Id.* 47.

b 9 *Cranch*, 98.

which the defendants claim to have been fraudulently obtained by the original grantees, as they are *bona fide* purchasers without notice, they are entitled to the protection of the Court.[a] The Courts of Tennessee have established the doctrine, that even in the case of a void grant, a junior grantee shall not avail himself of its nullity as against an innocent purchaser without notice.[b]

March 9th.

Mr. Justice JOHNSON delivered the opinion of the Court. Both these titles are founded on what are called removed warrants, and *priority* of entry is altogether immaterial to the issue. But the *existence* of an entry, it is contended on behalf of the plaintiff, is indispensable to the issuing of a warrant of survey, and to the validity of grants, which ought by law to have their origin in such entries. With a view, therefore, to impeach the prior grant to Sevier, under which these defendants claim, the plaintiff proposes to prove, that there never were in fact any entries made to justify the issuing of the warrants under which their title had its inception. It has been also suggested, that his intention further was to prove the warrants themselves forgeries. But this does not appear from the bill of exceptions, as will be more particularly shown when we come to analyze it, with a view of determining what evidence appears to have been rejected in the Circuit Court.

a Fletcher v. Peck, 6 *Cranch*, 133.
b Miller v. Holt, 1 *Tenn. Rep.* 111.

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The evidence offered in the Court below, with a view to invalidating Sevier's grant, was rejected, and on the writ of error to this Court, one general question arises, whether any, and if any, what evidence of facts, prior to the issuing of a grant, shall be received to invalidate it?

Authority of local decisions upon the laws of real property in this Court.

When the case was before this Court, in the year 1815, the same question was brought to its notice, and received its most earnest and anxious attention. Long experience had satisfied the mind of every member of the Court, of the glaring impolicy of ever admitting an inquiry beyond the dates of the grants under which lands are claimed. But the peculiar situation of Kentucky and Tennessee, with relation to the parent States of Virginia and North Carolina, and the statutory provisions and course of decisions that have grown out of that relation, has imposed upon this Court the necessity of pursuing a course which nothing but necessity could have reconciled to its ideas of law or policy. The sole object for which jurisdiction of cases, between citizens of different states, is vested in the Courts of the United States, is to secure to all the administration of justice, upon the same principles on which it is administered between citizens of the same State. Hence, this Court has never hesitated to conform to the settled doctrines of the States on landed property, where they are fixed, and can be satisfactorily ascertained; nor would it ever be led to deviate from them, in any case that bore the semblance of impartial justice.

Decision of this Court, S. C., 9 *Cranch*, 87, reconciled with the present case.

It has been supposed, that in the former decision alluded to in this case, this Court has gone beyond

the decisions of the Courts of Tennessee, in opening the door to inquiries into circumstances occurring prior to the issuing of a grant.

An attentive perusal of that decision will detect the error; or prove, if it has done so, it has done it on principles that cannot be controverted.

It is obvious from the report of the decision, that it was at that time presented under an aspect somewhat different from that in which it now appears. The *forgery* of the warrants constituted a part of the case which the plaintiff was precluded from making out in evidence. And to collect the purport of the decision, at that time rendered, the best resort will be to the words in which it is delivered.

Two sentences will give the substance of that decision. They are expressed in the following words: "But there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law." And "If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the State; and *independent of the act of cession* to the United States, the grant is void by the express words of the law."

These two sentences comprise the substance of that decision. For, as to the doubts expressed in the last paragraph of the opinion, relative to the inception of a right in the ceded territory prior to the cession, it is but a doubt, and is removed by a reference

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to the 6th section of the act of 1784. As to the question what evidence shall be sufficient to prove the existence of the entry, the Court is silent. As to what validity shall be given to the grants emanating from North Carolina, the decision places it upon the statutes of North Carolina. And although an opinion is expressed that North Carolina could make no new grants after the cession, who could have entertained a doubt upon that question? The right reserved to her was to perfect incipient grants; but what restraint is imposed upon her discretion? or what doubt suggested of her good faith in executing that power?

It will be perceived, that as to *irregularities* committed by the officers of government prior to the grant, the Court does not express a doubt but that the government, and not the individual, must bear the consequences resulting from them. On the contrary, it declares, that the existence of the grant is, in itself, a sufficient ground, from which every man may infer that every prerequisite has been performed. All, then, that it decides is, that an entry was indispensable as the inception of a title to Sevier; that if an original grant had issued to him after the cession, or a title had been perfected where there was no incipient title before the cession, as in the case of a grant on a forged warrant, and no entry, that it would be void. But, in admitting that the grant shall support the presumption that every prerequisite existed, it necessarily admits, that a warrant shall be evidence of the existence of an entry. Nor is it by any means conclusive to the contrary, that the entry does not appear

upon the abstract of entries in Washington county, recorded in the Secretary's office. On the contrary, if the warrants issued are signed by the entry-taker, it is conclusive that the locations were received by him, and if he omitted to enter them, his neglect ought not to prejudice the rights of him in whose favour the warrants were issued.

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That an entry is necessary to give validity to these grants, we think not only perfectly deducible from the statutory provisions in force in Tennessee, but also, from the legal adjudications of their Courts. Nay, they have not assumed the principle, that the issuing of the grant shall be deemed a recognition of the legal sufficiency of an entry; but have decided a grant void which emanated from an entry not sanctioned by the statutes of North Carolina, though the grant was issued when it might have lawfully issued. (Jackson v. Honeycut, 1 *Tenn. Rep.* 30.) And in the case of Dodson v. Cock and Stewart, so much relied on in the argument, the legal validity of a grant is expressly referred to the validity of the entry at the time it was made. (*Id.* 232.) It would indeed, be wonderful if it were otherwise, since it is the acknowledged law of Tennessee, that a prior entry will give precedence to a junior grant: a principle which obviously supposes the entry to be of the essence of the transfer of property; the grant, that which gives it palpable existence; or, at least, that it holds the freehold in abeyance, ready to vest upon the contingency of the expected grant.

It has, also, been asserted, that the Courts of the State of Tennessee have frequently, and uniformly,

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decided directly the reverse of the opinion of the Supreme Court. This assertion has reference to that part of the opinion which declares, that a grant issuing "without entry, and on forged warrants," is a void grant. Such an idea could only have resulted from inattention to the obvious distinction between the acts of the State's agents or officers, and the impositions practised upon them: between the case of a right really incipient, and that where no right ever did exist. How could the State of North Carolina have been performing an act toward *perfecting a right*, where, by the supposed case, no right could possibly have existed, no entry ever was made, and the warrant forged? A new grant, it must be admitted, she could not have made: but would not this have been a new grant? We will respect the decisions of the State tribunals, but there are limits which no Court can transcend.

But the Courts of Tennessee have not so decided. In the case of Dodson v. Cocke and Stewart, it will be found that the marginal note of the decision is too general in its expression, and that the Court decides nothing but what has been expressly admitted by this Court, since the legal validity of the entry is made the very basis of that decision. So of the case of Sevier and Anderson v. Hill, the only point on which the judges seem to have coincided was, that no other consideration should be proved than what the grant expressed on the face of it, (see the opinion of Judge Humphreys.) If any other point is decided, it is immaterial to the present question.

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This Court disavows having ever decided more than that an entry, or other legal incipiency of title, was necessary to the validity of a grant issued by North Carolina, for lands in Tennessee, after the separation. They have never expressed an inclination to let in inquiries into the frauds, irregularities, acts of negligence, or of ignorance of the officers of government, prior to the issuing of the grant; but, on the contrary, have expressed the opinion, that the government must bear the consequences. But while they admit that a genuine warrant shall be in itself the evidence of an entry, they cannot yield to the absurdity of attaching that effect to a forged warrant.

With regard to the decisions of the State of North Carolina, it is a well known fact, that on the subject of the effect of entries, the Courts of the two States are at direct variance. And, singular as it may seem, opposite constructions of the same laws constitute rules of decision to their respective Courts. And if it is the law upon their own citizens, we are willing to apply the same rules of property to all others. But even the Courts of that State, in their rigid adherence to the dates and effect of grants, and the principle that they are not void but voidable, are sometimes driven to the most awkward shifts in adjudicating on cases affected by the act of 1777. Thus, in the Trustees of the University v. Sawyer, (*Taylor's Rep.* 114.) they have said, that although "they cannot declare a grant void, they will adjudge that the grantee takes nothing under it." And in a case decided in 1802, (*N. Carolina Rep.* 441.) they

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have found themselves compelled, under their acts of 1777, 1778, and 1783, to declare a grant absolutely void, on the ground of the invalidity of the entry with reference to facts that required the intervention of a jury. So that it would seem even in North Carolina, a valid entry was indispensable to a valid grant. That priority of entry would not give priority to a junior grant, is certainly decided in the case of Williams v. Wells, reported in the *North Carolina Law Repository*, 383. But even that point, it would seem, had not been well established as a principle of law, since the jury, in that case, (which is a recent one,) manifested their dissatisfaction with the charge of the Court, by finding against it.

Bona fide purchaser without notice, under a void grant, protected by the law of Tennessee.

There was one point made in the argument of this case, which, from its general importance, merits our serious attention, and which may have entered into the views of the Circuit Court in making their decision. It was, whether, admitting this grant to be void, innocent purchasers without notice, holding under it, should be affected by its nullity?

This would seem to depend on the question, whether we shall, as to innocent purchasers, view it as a void or voidable grant.

On general principles, it is incontestable, that a grantee can convey no more than he possesses. Hence, those who came in under the holder of a void grant, can acquire nothing. But it is clear that the Courts of the State of Tennessee have held otherwise. In Miller v. Holt, (1 *Tenn. Rep.* 111.) it is expressly adjudged, that whether a grant be

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void or voidable, a junior grantee shall not avail himself of its nullity as against an innocent purchaser without notice. Yet the North Carolina act of 1777, certainly declares grants, obtained by fraud, to be absolutely void. And the same result must follow, where the State has relinquished its power to grant, or no law exists to support the validity of a grant. But it seems that the Courts of Tennessee have adopted this distinction, that grants in such cases shall be deemed void only as against the State, and not then until adjudged so by some process of law. That as between individuals, the title shall be held to vest *sub modo*, and innocent purchasers, without notice, shall not be ousted by the intervention of a subsequent grantee.

If this be the settled law of Tennessee, we are satisfied that it should rest on the authority of adjudication. There is certainly a palpable distinction between the cases of an original grantee, and a subsequent purchaser without notice. There can be no reason why the grantee should be favoured by the leaning of Courts; but the latter, finding the grantee in possession of the patent of the State, which on its face presents nothing to put him on his guard, has strong claims upon the favour of Courts, and the justice of the country.

The evidence rejected, how far competent.

Upon analysing the bill of exceptions, it will be found, that the plaintiff does not propose to prove in express terms, that the warrants in this case were forgeries. But, with a view to proving that there were no entries to authorize the issuing of the warrants, he tenders various certified documents from

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the several offices of North Carolina and Tennessee, from which he would raise an inference, that it was impossible that such entries could have existed; and then tenders parol evidence to prove, that the locations on which the warrants purport to have issued had never been passed to entry, and together with the warrants and surveys founded upon them had been rejected by a particular entry-taker, (the successor of him who is supposed to have issued these warrants,) on the ground of their being spurious and invalid. Also, that they had been reported as spurious by a committee of the Tennessee legislature.

As the exception does not come up, on a misdirection of the Court, but generally on the rejection of the evidence offered, the only remaining questions arise on its legal competency.

And, first, we are of opinion, that the document marked K. in the transcript of the record, was competent evidence to prove the fact of the existence of the entries therein specified, and so far it ought to have been admitted, because it is expressly made evidence by the act of the 21st of September, 1801. But, as far as a negative use was intended to be made of that abstract, we are of opinion, the certificate of the officer was properly rejected. There is no such effect given either to that document, or the clerk's certificate, by any legislative act, and such an effect could only be given to the production of the whole abstract, from which the Court might, by inspection, have ascertained the fact of the non-existence of the contested entries; or from an exami-

nation of the keeper of that document as an ordinary witness, or inspection of it made under a commission.

The documents offered, marked H. and L. were numerous certificates from the secretary's office of North Carolina, of warrants and grants, introduced to prove, that on the entries of the dates specified as the dates of the entries to Sevier, other warrants issued, and other grants were obtained in the name of various individuals, but none to Sevier. This evidence, also, we are of opinion, was competent circumstantial evidence, and ought not to have been wholly rejected.

With regard to the report of the committee of the house, we can hardly think it could have been seriously offered; and the parol evidence respecting the rejection by the subsequent entry-taker, was, also, properly rejected, inasmuch as the rejection of the return of these warrants and surveys, was a perfectly immaterial circumstance upon this issue. It might as well have been the result of that entry-taker's folly, or his wrong, as of any other cause. The emanation of the grant is sufficient evidence that the claim of Sevier must have met with a more favourable reception from a higher quarter. Upon the whole, the only ground on which we could sustain the decision in the Court below is, *that a subsequent purchaser without notice is not to be affected by any legal defects in a grant which might have issued conformably to existing laws.* For, in that case, all the evidence rejected may have been immaterial to the issue. But, *non constat*, that the evidence rejected

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was not connected with proof to rebut that defence. It is, therefore, not necessary here to decide definitively on that point of the law. If it is the received doctrine of the Tennessee Courts, we have expressed our inclination not to shake it. But the cause must necessarily be sent back upon the rejection of the documents marked H. K. & L.

Judgment reversed.

JUDGMENT. This cause came on to be heard on the transcript of the record of the Circuit Court for the district of West Tennessee, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that there is error in the proceedings of the said Circuit Court, in rejecting the documents marked in the transcript of the record with the letters H. K. and L., as incompetent evidence. It is, therefore, ADJUDGED and ORDERED, that the judgment of the Circuit Court, for the district of West Tennessee, in this case, be, and the same is hereby, reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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Marshall v. Beverley.

(Chancery.)

Marshall v. P. R. Beverley.

In Equity, a final decree cannot be pronounced until all parties in interest are brought before the Court.

Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange drawn by the plaintiff, and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by whom the judgments were obtained; *held*, that the injunction could not be decreed until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them, because such statement and admission might be made by collusion.

Appeal from the Circuit Court of Virginia.

Carter Beverley, being indebted to the appellant, Horace Marshall, assigned to him several bills of exchange, amounting, in the aggregate, to 900*l.* sterling, which had been drawn by the respondent, Peter R. Beverley, on Bird Beverley, of London, in favour of the said Carter Beverley. These bills were severally transferred, for valuable consideration, by the appellant, to Luke Tiernan & Co., Stewart Montgomery & Co., Jesse Eichelberger & Co., and Cornelius and John Comegys; and having been forwarded by them to London for payment, were protested for non-acceptance and non-payment, and so returned. Suits were instituted by these parties against Peter R. Beverley, on which he confessed judgments. Having been taken in execution

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and imprisoned, he gave bond for the prison bounds, which he broke. A second series of suits were brought on the prison bounds bonds, after judgments on which, he filed the present bill against Horace Marshall, Carter Beverley, Luke Tiernan & Co., Stewart Montgomery & Co., Jesse Eichelberger & Co., Cornelius and John Comegys, and John Brown, charging usury in the transactions between Carter Beverley and Horace Marshall, and a fraudulent sale of certain slaves of Carter Beverley, on which Horace Marshall retained a lien, as a collateral security for his debt; and charging, also, that although the suits were in the name of Luke Tiernan and others, (to whom the bills had been transferred,) they were, in fact, for the complainant's benefit, he having paid to his endorser what was due on those bills. On these grounds, a perpetual injunction was prayed for and awarded. The appellant, by his answer, admitted the last allegation; but denied the usury, and insisted that the sales of Carter Beverley's negroes had been made in strict conformity with the deed of trust under which they were sold. None of the other defendants answered the bill.

March 4th. This cause was argued by the *Attorney-General*, for the appellant, and by Mr. *Jones* and Mr. *Taylor*, for the respondent.

March 9th. Mr. Justice LIVINGSTON delivered the opinion of the Court. This is an appeal from a decree in equity, of the Circuit Court for the district of Vir-

ginia, to which the following objections have been made:

1st. That there is a defect of parties. Although all the persons in interest are made defendants to the bill, yet none of them had appeared to it except the appellant, on whose answer, and the proofs in the cause, the decree was made.

2d. Another objection is, that there was competent relief at law against the usurious contract stated in the bill; but as no defence of this kind was there set up, a Court of Chancery ought not to have interfered, especially after judgment had been obtained on the bills, and even on the prison bounds bonds, which were taken on the execution which had issued on those judgments.

3d. It is also contended, that there was no usury in any of the contracts between the appellant and Carter Beverley, and that the sale of the negroes under the deed of trust was fair, and in strict pursuance of the authority vested in the trustee.

4th, and lastly: Admitting the usury, and a frand in the sale, it is insisted that the respondent, being an entire stranger to these transactions, had no right to call the appellant to account, or to any relief as against him.

The Court has had under its consideration all these objections; but will now give its opinion only on the first of them. We are all satisfied, that when this decree was pronounced, the case was not prepared for a final hearing. The bills, which had been drawn by P. R. Beverley, having passed by Marshall into the hands of third persons, who had

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obtained judgments on them, and it being a principal object of the suit to enjoin further proceedings on them, the parties in whose favour they were rendered, ought not only to have been made defendants, but a perpetual injunction ought not to have been decreed until their answers were filed. It was not enough in their absence that the complainant should state, and the defendant admit, that the latter had paid these judgments, and was now the only person interested in them. This might be done by collusion, and although that may not be the case here, it is not the course of a Court of Equity, to make a decree which is to operate directly upon the parties in interest, as the perpetual injunction does here, without affording them an opportunity of being heard. For this error, the decree must be reversed, and the cause remanded for further proceedings.

Decree reversed.

Decree. This cause came on to be heard on the transcript of the record of the Circuit Court, for the district of Virginia, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that the said Circuit Court erred in perpetually enjoining the proceedings on the judgments obtained against the respondent, Peter R. Beverley, and the appellant, Horace Marshall, because the bills of exchange, which had been drawn by the said Peter R. Beverley, had passed into the hands of third persons, by whom the said judgments had been obtained, and before the answers of such creditors, who had been made defendants to said bill of complaint, had come

in. It is therefore DECREED and ORDERED, that the decree of the said Circuit Court in this case be, and the same is hereby, reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court for further proceedings to be had therein according to law.

1820. Loughborough v. Blake.

(CONSTITUTIONAL LAW.)

LOUGHBOROUGH v. BLAKE.

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Congress has authority to impose a direct tax on the district of Columbia, in proportion to the census directed to be taken by the constitution.

The power of Congress to *levy and collect taxes, duties, imposts and excises*, is co-extensive with the territory of the United States.

The power of Congress to exercise *exclusive jurisdiction in all cases whatsoever* within the district of Columbia, includes the power of taxing it.

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THIS case, which was an action of trespass brought in the Circuit Court for the district of Columbia, to try the right of Congress to impose a direct tax on that district, and in which the Court below gave judgment for the defendant, was argued by Mr. *Jones* for the plaintiff, and by the *Attorney General* for the defendant. *March 7th.*

Mr. Chief Justice MARSHALL delivered the opinion of the Court. This case presents to the consideration of the Court a single question. It is this: *March 10th.*

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Has Congress a right to impose a direct tax on the District of Columbia?

The counsel who maintains the negative has contended, that Congress must be considered in two distinct characters. In one character as legislating for the States; in the other, as a local legislature for the district. In the latter character, it is admitted, the power of levying direct taxes may be exercised; but, it is contended, for district purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes.

Without inquiring at present into the soundness of this distinction, its possible influence on the application in this district of the first article of the constitution, and of several of the amendments, may not be altogether unworthy of consideration. It will readily suggest itself to the gentlemen who press this argument, that those articles which, in general terms, restrain the power of Congress, may be applied to the laws enacted by that body for the district, if it be considered as governing the district in its character as the national legislature, with less difficulty than if it be considered a mere local legislature.

But we deem it unnecessary to pursue this investigation, because we think the right of Congress to tax the district does not depend solely on the grant of exclusive legislation.

The power of Congress to *lay and collect taxes, duties,* &c. extends to the district of Columbia, and to the territories of the United States.

The 8th section of the 1st article gives to Congress the "power to lay and collect taxes, duties, imposts and excises," for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It, consequently, extends to all

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places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "but all duties, imposts, and excises, shall be uniform throughout the United States." It will not be contended, that the modification of the power extends to places to which the power itself does not extend. The power then to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States.

The provision that *direct taxes shall be apportioned among the several States, according to their respective numbers*, to be ascertained by a census, was not intended to restrict the power of imposing direct taxes to States only.

The extent of the grant being ascertained, how far is it abridged by any part of the constitution?

The 20th section of the first article declares, that "representatives and direct taxes shall be apportioned among the several States which may be in-

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cluded within this Union, according to their respective numbers."

The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean, that direct taxes shall be imposed on States only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to States, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one State had been found to contain 59,000, and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the States.

The 4th paragraph of the 9th section of the same article will next be considered. It is in these words: "No capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration herein before directed to be taken."

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The census referred to is in that clause of the constitution which has just been considered, which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the States. The actual enumeration is to be made "within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

As the direct and declared object of this census is, to furnish a standard by which "representatives, and direct taxes, may be apportioned among the several States which may be included within this Union," it will be admitted, that the omission to extend it to the district or the territories, would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It cannot, however, be admitted, that the argument which limits the application of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not that "no capitation or other direct tax shall be laid, unless on those comprehended within the census herein before directed to be taken," but "unless in proportion to" that census. Now this proportion may be applied to the district or territories. If an enumeration be taken of the population in the district and territories, on the same principles on which the enumeration of the respective States is made, then the information is acquired by which a direct tax may be imposed on the district and territories, "in proportion to the

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census or enumeration" which the constitution directs to be taken.

The standard, then, by which direct taxes must be laid, is applicable to this district, and will enable Congress to apportion on it, its just and equal share of the burthen, with the same accuracy as on the respective States. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction, that it would produce the necessity of extending direct taxation to the district and territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be co-extensive with the United States, then it is contended, that the restrictive clause, if applicable to the district and territories, requires that the tax should be extended to them, since to omit them would be to violate the rule of proportion.

But Congress are not bound to extend a direct tax to the district and territories.

We think, a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the constitution which have been recited.

That the general grant of power to lay and collect taxes, is made in terms which comprehend the district and territories as well as the States, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community.

The words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given in the 2d section of the first article for its application to the respective States. That rule declares how direct taxes upon the States shall be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the constitution. Congress has clearly no power to exempt any State from its due share of the burthen. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the district or territories. The words of the 9th section do not in terms require, that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the States. They, therefore, may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention, that the expense of executing the law in a territory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the 9th section, relates to the obligation to apportion a direct tax on the territories as well as the States, rather than to the power to do so.

If, then, the language of the constitution be construed to comprehend the territories and district of Columbia, as well as the States, that language confers on Congress the power of taxing the district

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and territories as well as the States. If the general language of the constitution should be confined to the States, still the 16th paragraph of the 8th section gives to Congress the power of exercising "exclusive legislation in all cases whatsoever within this district."

The power of exclusive legislation over the district includes the power of imposing taxes.

On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended, that they must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation.

The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government, as is the case with the district, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby

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the more secure; and certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.

If it were true that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises, within this district? If the principles of liberty, and of our constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten that neither the stamp act nor the duty on tea were direct taxes.

Yet it is admitted, that the constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district.

If it be said, that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes.

After giving this subject its serious attention, the Court is unanimously of opinion, that Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia, in proportion to the census directed to be taken by the constitution, and that there is no error in the judgment of the Circuit Court.

Judgment affirmed.

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Mechanics' Bank v. Bank of Columbia.

(COMMON LAW.)

MECHANICS' BANK OF ALEXANDRIA v. THE BANK OF COLUMBIA.

The 17th section of the act, incorporating the Mechanics' Bank of Alexandria, providing "that all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the President, and countersigned by the Cashier; and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts and undertakings implied in law.

Where a check was drawn by a person who was the cashier of an incorporated Bank, and it appeared doubtful upon the face of the instrument, whether it was an official or a private act, parol evidence was admitted to show that it was an official act.

The act of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency.

The liability of the principal depends upon the facts, 1st. That the act was done in the exercise, and, 2dly. Within the limits of the power delegated.

In ascertaining these facts, as connected with the execution of any written instrument, parol testimony is admissible.

ERROR to the Circuit Court for the District of Columbia.

This was an action of assumpsit, brought by the defendants in error against the plaintiffs in error, on the following check:

No. 18. Mechanics' Bank of Alexandria,
June 25th, 1817.

CASHIER of the Bank of Columbia,

Pay to the order of P. H. Minor, Esq. Ten Thousand Dollars.

WM. PATON, Jr.

$10,000

This check was offered in evidence by the plaintiff below, and testimony to prove that the said Paton, before, at the time, and subsequent to the drawing of the said check, was cashier of the said Mechanics' Bank, and the said Minor the teller thereof; and in order to prove that the said check was drawn by the said William Paton in his capacity as cashier, and was so understood by him, and so understood by the said Bank of Columbia, their officers and servants; evidence was further offered to prove, that from the 8th of May, 1817, to the time of drawing the said check, there was kept in the said Mechanics' Bank, by the proper officer thereof, a book of printed checks in blank, for the purpose of being used by the cashier, in drawing his official checks; and that the check in question had been cut out of the said book: That the said Cashier, in his official character, had frequently used the blank checks out of the said book, in drawing upon other banks in the district, and there was no other difference between the checks so drawn, and the check in question, other than the letters "Cas." or "Ca." being superadded to the name of the said William Paton, Jun. in the checks

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so drawn upon the said other banks: That although the said check book was intended for the use of the bank, the checks in the same were sometimes used for other purposes: That the business of the said banks was sometimes managed through the medium of letters; and in such official correspondence, it was usual to subscribe the names of the cashiers, with the addition of some letters denoting their capacity of Cashier; but such form was sometimes omitted, and was in no case deemed indispensable, when, from other circumstances, such correspondence appeared to be official. The plaintiffs further offered in evidence two letters of the said William Paton, directed to William Whann, Cashier of the Bank of Columbia, each signed with the proper name of the said William Paton, without the addition of Cashier, or the letters "Cas." or "Ca." one of which letters related to the private concerns of the said William Whann, and the other to the concerns of the bank.

Evidence was further offered to prove that the check given in evidence as aforesaid, was, (together with a number of other checks, drawn by the said William Paton upon other banks, with the addition in his signature of the letters "Ca." and "Cas." and cut out of the official check book,) sent by the said Paton, on the 12th of July, 1817, by the hands of the said Philip H. Minor, then being teller as aforesaid, to Richard Smith, Cashier of the Office of Discount and Deposit of the Bank of the United States at Washington, to be paid in liquidation of a balance due from the said Mechanics' Bank to the said Office of Discount and Deposit: That the said letter was

delivered by the said Minor to the said Smith, and the checks and moneys contained in the same were applied to the credit of the said Mechanics' Bank: That among the checks so sent, was one for $17,626 5, written upon, and cut out of the check book aforesaid, and in the words and figures following, to wit:

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Mechanics' Bank of Alexandria, July 12, 1817. *No.* 32.

Cashier of the Branch Bank of the United States, Washington—Pay to the order of Philip H. Minor, amount of discount made me, which I believe is seventeen thousand six hundred and twenty-six dollars and five cents.

WM. PATON, Jun.

That the said Richard Smith, about the 17th of July, 1817, did cause the same to be presented to the Bank of Columbia for payment, and the same was accordingly paid, and was thereupon immediately charged to the said Mechanics' Bank.

Evidence was further offered to prove that the said Richard Smith considered the said check as the official check of the said William Paton, and it was so paid by him; and that the Cashier of the Bank of Columbia also considered it as the official check of the said Paton, and it was so paid by him.

Evidence was further offered, on the part of the Mechanics' Bank, to prove that the said William Paton, at the time he drew the said check, declared it was his private individual check; that he had

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funds in the Bank of Columbia to meet it, and that it was passed by him to the said Mechanics' Bank as the individual check of the said William Paton. And evidence was further offered to prove that the Mechanics' Bank paid to the said Paton the amount of the said check.

Upon the evidence thus offered by the plaintiffs below, the counsel for the defendants objected to the whole of the said evidence, and insisted, that if the said check for 10,000 dollars, could be used as evidence against the said Mechanics' Bank, that the character of the said check could only be decided by the check itself, and that no parol or other testimony could be received to explain the same, and objected to the testimony offered upon that ground. But the Court overruled the objection, and gave it as their opinion to the jury, that the said check was, in connexion with the other evidence, proper and competent evidence in this case against the said Mechanics' Bank, and that it was competent to explain the character of the said check; or, in other words, to prove, by parol or other testimony, that the said check was drawn under such circumstances, and in such a manner, as justified the plaintiffs in considering it as an official check, and paying it as such, and charging the same to the debit of the defendants. And the evidence offered as aforesaid, with the said check, was admitted by the Court, and given in evidence to the jury.

The defendants below, then prayed the opinion of the Court, and their instruction to the jury, that the check for 10,000 dollars, produced in evidence

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by the plaintiffs, is, on the face of it, a private, and not an official check, and of itself cannot, in law, charge the Mechanics' Bank with the payment of the said 10,000 dollars; and that the said William Paton was liable in his individual character for the payment of the same. Which opinion the Court refused to give.

They also prayed the Court to instruct the jury, that the check aforesaid was, upon the face of it, *prima facie* evidence of its being the private individual check of the said William Paton, and the possession of the said check by the said Mechanics' Bank, if proved to be in their possession, was *prima facie* evidence that they had paid a value for it; and that unless the Bank of Columbia should satisfy the jury by other evidence than the said check, that it was an official check of the cashier of the said bank, that the jury should find their verdict for the defendants. Which instruction the Court refused to give.

The defendants below also prayed the Court to instruct the jury, that if they should be of opinion, that the check was drawn by the said William Paton as his individual check, and was received by the said Mechanics' Bank, as the individual check of the said William Paton, and that the bank paid to the said Paton the full amount of the said check, that then the said bank having received the amount thereof from the bank of the United States as aforesaid, would have a right to retain the amount of the said check as against the said Bank of Columbia, notwithstanding the said Bank of Columbia may have been under an impression that it was the official check

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of the said William Paton. Which instruction the Court refused to give.

A bill of exceptions was filed, and a verdict and judgment thereon having been rendered for the plaintiff, the cause was brought by writ of error to this Court.

March 8th. Mr. *Swann*, and Mr. *Lee*, for the plaintiffs in error, argued, 1. That parol evidence to prove the character or capacity in which the check was drawn, was clearly inadmissible. The check bears, on the face of it, all the qualities of a bill of exchange. It binds the drawer in his individual capacity. When it is competent for a party to bind himself individually, parol evidence cannot be introduced to show, that what he has in fact done in his own name, was intended to be done as an agent for others.[a] If one of several partners promise individually to pay a debt, he will not be permitted to show that it was due jointly from himself and his partners.[b] And, generally, all parol evidence to contradict, or vary, a written instrument, is inadmissible.[c] The object of the testimony in the present case, is, not to show that the drawer is liable to a greater or a less extent than that expressed on the face of the check, but to make a corporation, whose servant he was, liable for a debt which, according to the face of the instrument, is a private debt. For if the check, on the

a Frontin v. Small, Lord *Raym.* 1418. *Salk.* 96. Wilks v. Pack, 2 *East*, 142. Preston v. Merceau, 2 *Wm. Black.* 1249. Meres v. Ansell, 3 *Wils.* 275.

b Murray v. Somerville, 2 *Camp. N. P.* 99.

c Russell v. Clarke, 3 *Dall.* 424. and the cases there cited.

face of it, was an official one, the evidence was unnecessary; and introducing it is an admission that the instrument itself was not sufficient to bind the corporation. 2. The evidence of the debt being a written instrument, the construction of it is matter of law for the decision of the Court, and the Court ought to have instructed the jury, that the check was, on the face of it, a private, and not an official check, and could not bind the Mechanics' Bank. 3. But at all events, the check was *prima facie* evidence of its being the private check of the drawer, and the possession of it by the plaintiffs in error, was also *prima facie* evidence of their having paid a valuable consideration for it. 4. Again; this action cannot be maintained, because the contract upon which it is brought was not made in conformity with the charter of the Mechanics' Bank, which provides, (s. 17.) "that all bills, bonds, notes, *and every other contract or engagement* on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the corporation shall, *in no case, be liable for any contract or engagement*, unless the same shall be signed and countersigned as aforesaid."

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Mr. *Jones* and Mr. *Key*, *contra*, insisted, 1. That the check, upon the face of it, did not purport to be the private check of Paton, but the check of the bank, drawn by him as its Cashier, and that the presumption was, that it was an official act. 2. But supposing it to be equivocal on the face of the instrument, whether he acted in his official or private capacity, extrinsic parol evidence, to show in what capacity he acted, was admissible. This would not

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be evidence to contradict the written instrument, but only to explain it.[a] Suppose the Bank of Columbia had sued Paton, the date and entire face of the check would have been sufficient to defeat their action. There was enough to raise a presumption that he acted officially, because the act was within the scope of his authority. No rule of law obliged him to add to his name any designation of his official character; and even supposing him to be liable in his individual capacity, it does not follow that his principals are not liable for what he has done, the presumption being strongly in favour of the official character of the act. And if it be doubtful whether he is personally liable to the Bank of Columbia, he is certainly liable to the Mechanics' Bank, whose servant he was; who had the best means of knowing and correcting the fraud or mistake; and who, upon the principle of the rule *de damno evitando*, ought to bear the loss. 3. As to the law incorporating the Mechanics' Bank, it has no application to this case, unless it be contended that it would extend to the case of a deposit, and every other case where the law implies a contract. The action is not brought upon any such express undertaking as the act contemplates must be signed by the President, &c.; but upon an undertaking which the law implies, and which it may as well imply in the case of a corporation as of an individual.

March 13th. Mr. Justice JOHNSON delivered the opinion of the Court. The merits of this case lie within a very limited compass. The question is, whether a certain

[a] Dexter v. Hodgson, 1 *Cranch*, 345.

act, done by the Cashier of a Bank, was done in his official or individual capacity? Had the draft, signed by Paton, borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable.

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It has been contended, but the argument was not pressed with much confidence, that this defendant could not be bound otherwise than in conformity with the 17th section of the charter; by which it is enacted, "that all bills, bonds, notes, and every other contract or engagement, on behalf of the corporation, shall by signed by the President, and countersigned by the Cashier; and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid."

The 17th sec. of the charter incorporating the Mechanics' Bank, not applicable to this case.

It is to be hoped this argument was not intended to reach the case of a deposit of money; and yet if it proves any thing, it proves that no contract in law could be imputed to this bank. The truth is, that a check is properly neither a bond, bill, or note, with regard to the bank drawn upon, but an acquittance. And the contract arising out of a payment upon it, is a contract for money advanced, and must be so declared upon. It is true that checks are generally made payable to bearer, and this was made payable to order; but it is in evidence that it was drawn as a check, and paid as a check, and the declaration contains only the common money counts.

Of the six exceptions in the transcript of the

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record, the 1st, 2d, 4th, and 5th, are taken on behalf of the Mechanics' Bank of Alexandria. Upon comparing these exceptions with the evidence, it does not appear that they affirm any other proposition growing out of that evidence, but that the check, on the face of it, purported to be the private check of Paton, and no extrinsic evidence could be received to prove the contrary.

Presumption that the check was official, and parol testimony admissible to explain the ambiguity.

The only ground on which it can be contended that this check was a private check, is, that it had not below the name the letters *Cas.* or *Ca.* But the fallacy of the proposition will at once appear, from the consideration, that the consequence would be, that all Paton's checks must have been adjudged private. For no definite meaning could be attached to the addition of those letters without the aid of parol testimony.

But the fact that this appeared on its face to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate, and not an individual transaction: to which must be added the circumstances, that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of *to order*, for *to bearer*. The evidence, therefore, on the face of the bill, predominates in favour of its being a bank transaction. Applying, then, the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But, it is enough for the purposes of the defendant to establish, that there exist-

ed, on the face of the paper, circumstances from which it might reasonably be inferred, that it was either one or the other. In that case, it became indispensable to resort to extrinsic evidence, to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz. that this was the appropriate form of an official check; that it was, in fact, cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of, and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction. It is true, it was in evidence that this check was credited to Paton's own account, on the books of his bank. But it was done by his own order, and with the evidence before their eyes, that it was officially drawn. This would never have been sanctioned by the directors, unless for reasons which they best understood, and on account of debits which they only could explain.

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The acts of agents, as connected with the execution of written instruments, how far explainable by parol evidence.

It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, 1. That the act was done in the exercise, and, 2. Within the limits of the powers delegated. These

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facts are necessarily inquirable into by a Court and jury; and this inquiry is not confined to written instruments, (to which alone the principle contended for could apply,) but to any act with, or without writing, within the scope of the power or confidence reposed in the agent; as, for instance, in the case of money credited in the books of a teller, or proved to have been deposited with him, though he omits to credit it.

Judgment affirmed.

(PRIZE AND INSTANCE COURT.)

The JOSEFA SEGUNDA, *Carricabura et al.* Claimants.

An information under the act of the 3d of March, 1807, c. 77. to prevent the importation of slaves into the United States. The alleged unlawful importation attempted to be excused upon the plea of distress. Excuse repelled, and condemnation pronounced.

Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried.

But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be devested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize may be carried.

APPEAL from the District Court of Louisiana. From the proceedings in the Court below, it appear-

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ed, that the brig Josefa Segunda being Spanish property, and on a voyage from the coast of Africa to the island of Cuba, with a cargo of negroes, was captured on the 11th day of February, 1818, off Cape Tiberon in St. Domingo, by the Venezuelan privateer, the General Arismendi. On the 24th of April following, she was seized in the river Mississippi, by certain custom house officers, and conducted to New-Orleans, where a libel was filed against her in the District Court for the Louisiana district.

The libel contained four counts. The first alleged, that the said negroes were unlawfully brought into the United States from some foreign country in the said brig, with intent to hold, sell, or dispose of them as slaves, or with intent that the same should be held to service or labour, contrary to the act of Congress in such case made and provided.

The second count alleged, that these negroes were taken, received and transported on board the said brig, from some of the coasts or kingdoms of Africa, or from some other foreign kingdom, place, or country, for the purpose of selling them in some port or place within the jurisdiction of the United States, as slaves, or to be held to service or labour, contrary, &c. In the third count it was charged, that the said brig was found in some river, port, bay, or harbour of the United States, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, to wit, in the river Mississippi, having on board some negroes, mulattoes, or people of colour, for the purpose of selling them as slaves, or with an intent to land the same, in some port or

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place within the jurisdiction of the United States, contrary, &c. The fourth allegation or count was, that one hundred and seventy-five persons of colour, not being native citizens, or registered seamen of the United States, or natives of countries beyond the Cape of Good Hope, were landed from said brig, in a port or place, situate in a State which, by law, had prohibited the admission or importation as aforesaid, to wit, at or near the Balize in the State of Louisiana, contrary, &c.

This libel was filed on the 29th of April, 1818, and on the 5th of May following, a claim was interposed by Messrs. Carricabura, Arieta & Co. merchants of the Havanna, which stated, that they were owners of the said brig, which, with the said negro slaves, was on the high seas, while pursuing a lawful voyage, captured and taken from them by a certain Rene Beluche, and the crew of the armed ship or vessel called the General Arismendi, sailing under the flag of the revolted colonies of Venezuela and New-Grenada; that the said brig put into the Balize in very great distress, and without any intention on the part of the crew, or any other person on board, to infringe or violate any law of the United States. That whatever may have been the conduct of the prize crew, or of any other persons on board, the claimants insist, that they cannot be made responsible for any of their acts, because the said brig, with her cargo, was taken from their possession unlawfully, and in violation of the law of nations, inasmuch as the captors had no legal authority to take the same; and if they had any commission, the capture

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was illegal, because the privateer the General Arismendi, was armed and fitted out, or her armament or equipment increased, in a port of the United States, in violation of the laws thereof.

On this libel and claim, it appeared in evidence that the capture of the brig Josefa Segunda, with a cargo of slaves, was made off Cape Tiberon, in the Island of St. Domingo, on the 11th of February, 1818, on a voyage to the Havanna, from the coast of Africa, which she had left in the preceding month of December or January. The capture was made by a Venezuelan brig, the General Arismendi. This vessel was commissioned as a privateer, by John Baptista Arismendi, who styled himself commanding General of Venezuela, and Captain General of the Island of Marguerita. The caption of the commission was, "Republic of Venezuela;" and it purported to have been given in the Island of Marguerita, the 1st of February, in the year 1818, and to be sealed with the great seal of the State. At the time of capture, there were from two to three hundred slaves on board; some of these, but what number does not appear, afterwards died; others, but how many is not stated, were sold at the Jardins de la Reine, on the south side of the Island of Cuba, in order to purchase provisions. Toward the end of the month of February, the prize master of the brig received written orders from the Captain of the privateer to conduct the prize to the Island of Marguerita; and always steered, as he says, eastward, the winds being always ahead. The prize master had no log book on board; he wrote every day's occurrences on

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a slate, effacing what had been written the day before. On the 18th of April, 1818, in the morning, the brig was boarded by a pilot, about 40 miles from the Balize, and arrived there at 4 o'clock, P. M. About 25 miles from the Balize, the brig fell in with the American ship Balize, from which no provisions were asked, but from whom he received six bags of rice. On the 24th of April, the brig was seized by the custom-house officers, and conducted to New-Orleans. On the 27th of April, 1818, Laporte, who was the agent of Beluche at New-Orleans, wrote a letter to the prize master of the brig, containing, among others, these expressions, "Maintain always your declaration of being forced into port."—"Take care that your sailors neither say, nor do any thing, which may prejudice the interest of Venezuela." The privateer, after the capture of the brig, went to Jamaica for provisions. The pilot who first boarded the brig stated, that her mainmast was sprung, her ropes were all bad, the sails not fit to go to sea; that they were pumping the last cask of water on board. Her spars were middling, except the mainmast; there were no provisions on board—the men were in a state of starvation—that the slaves had nothing but skin upon their bones. A witness, who was on board in her passage up the river, stated that the brig sailed equal to any thing in the river—that he would not be afraid to make a voyage in her—her tackle, ropes, &c. were as good as usual—she was pumped out but once while he was on board—they carried topsails coming up—the spars were generally good. He saw nothing in the appearance of

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the crew of their having been starved. It also appeared that the agent of the claimants in New-Orleans, received letters from the owners of the brig sometime prior to her arrival at New-Orleans, and that one of the owners had arrived in that city, while this cause was depending, and before the 19th of June, 1818.

It was admitted by the claimant, that there existed an understanding between them and the captors; that the former were to render to the latter a compensation for their not interposing any claim, which was so far ascertained, that the sum which the captors were to receive, was not to be less than six, nor more than eight thousand dollars, to depend on the expense and trouble incident to the prosecution, and the repairing of the vessel; that this arrangement was made by the advice of the captor's counsel, from a conviction on his part, that they could not recover on account, as he conceived, of the illegality of the commission. It was also admitted, that the claimants were the original owners of the brig and slaves on board.

On this testimony, the District Court condemned the brig, and effects found on board, to the United States, and the cause was brought by appeal to this Court.

March 9th.

Mr. *C. J. Ingersoll*, for the appellants and claimants, argued, 1. That the vessel was compelled by necessity to enter the Mississippi, and, therefore, was not liable to forfeiture under the acts of Congress for suppressing the slave trade. 2. That the com-

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mission of General Arismendi, under which the original capture was made, was unlawful, he having no authority to issue it as Governor of the island of Marguerita, a dependent province of the new State of Venezuela. The owners were, therefore, entitled to restitution under the 9th article of the Spanish treaty of 1795, as well as under the general law of nations; the right of property not being changed by a piratical seizure.[a] 3. But supposing it to have been a regular capture in the exercise of the rights of war, and supposing the captors to have entered the waters of the United States with the intention of violating the acts of Congress, it is insisted, that the prize thus carried into a neutral port, before adjudication, cannot be forfeited *to the neutral State* for a breach of its municipal laws committed by the captors, without the consent or collusion of the original owners. It has been repeatedly determined, that when captures are made in violation of *our* neutral rights, as ascertained by the law of nations, the acts of Congress, and treaties with foreign powers, restitution of the captured property will be decreed by our tribunals to the original owners.[b] Why? Because it is the right as well as duty of the nation to prevent its neutral territory and resources from being used for the purposes of hostility by either belligerent. It will, therefore, restore in two cases:

a Grotius, de J. B. ac P. l. 3. *c.* 9. *s.* 17. *Bynk. Q. J. Pub. l.* 1. *c.* 17. *Valin, sur l'Ordon. l.* 3. *tit.* 9. *art.* 10. 2 *Bro. Civ. & Adm. Law*, 461.

b The Divina Pastora, 4 *Wheat.* 52. 55. and the cases cited in note.(*a*)

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First, where the capture is made within its territorial limits; and, secondly, when made by a vessel armed or re-equipped in its ports. The same principles apply where the captor violates the laws of police, or the revenue laws of the neutral State. The infringement of the one is as injurious to that State, and to the captured belligerent, as the infringement of the other. The injury to the original owner is equally great, whether the privateer was fitted in the neutral ports, or is permitted to carry his prizes into those ports for sale. The *spes recuperandi* is gone; and will the neutral sovereign condescend to avail himself, as against an innocent friend, of the forfeiture incurred by the misconduct of the enemy of the latter? The captor cannot sell; he cannot completely devest the original owner of his remaining right to the captured property before its lawful condemnation: shall he then be permitted to do so by smuggling, or even by attempting, or barely intending to smuggle it in a neutral port? It is the well established doctrine of public law, that belligerents have no right to sell or dispose of their prizes in a neutral port, before they are judicially condemned in a competent Court of the captor's country; unless in case of necessity, or when the right is secured to them by treaty, or by the express permission of the neutral government; or in case of the intervention of peace.[a] If, then, the captor has not such an

a *Bee's Adm. Rep.* 263. The Flad Oyen, 1 *Rob.* 114. The Purissima Conception, 6 *Rob.* 45. The Schoone Sophie, *Ib.* 138. 2 *Bro. Civ. & Adm. Law*, 255. 1 *Peters' Adm. Dec.* 24. 2 *Peters' A. D.* 345. The Kierlighett, 3 *Rob.* 82. Wheel-

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interest in his uncondemned prize, as will enable him to dispose of it by sale to another, how can he be said to have such an interest as will enable him to forfeit it to the neutral State for a breach of its municipal laws? This is a novel question, both here and in the European Courts of prize. It is indeed settled, that the Prize Court may dismiss the claim of a citizen, violating the law of his own country where the court sits; or of an ally or neutral violating the treaties between his own country and that of the Court; and that it may dismiss the libel of a captor (of the country where the Court sits,) for a collusive capture, or for a violation of the laws of trade. But the moment the neutral Court, in the present case, ascertained that this was a capture *jure belli*, or piratical, it had nothing to do but to restore it to the original possessor. The captor had not such a proprietary interest as rendered him capable of forfeiting it to the United States. The first case of a forfeiture in the Prize Court for a breach of municipal law, which is reported, is that of the Walsingham Packet:[a] that was the case of a British packet, retaken from the enemy, wherein a claim was given for the cargo as the property of British and Portuguese merchants, and resisted on the part of the captors, on the ground that such trade was prohibited by act of Parliament. Here the jurisdiction of the

right v. Depeyster, 1 *Johns. Rep.* 471. 481. 2 *Valin. Com. Sur l'Ord.* 272. and *seq.* *Vattel*, *l.* 4. *c.* 2. *s.* 22. *Marten's Law of Nations*, 323. *Wheat. on Capt.* 262.

[a] 2 *Rob.* 64.

Court, with respect to the thing recaptured, was unquestionable; and Sir W. Scott rejected the claim on account of the claimants *own personal* misconduct, reserving the ultimate question, to whom the property should be condemned. In the case of the Etrusco,[a] it was subsequently determined, that condemnation in such cases should be, not to the captors, but to the crown. In the case of the Recovery,[b] Sir W. Scott determined, that the claim of a neutral could not be rejected in a Prize Court of the captor's country, for violating the municipal law of that country. Why? Because, as to him, it was a mere Court of the law of nations, though as to British subjects it was also a Court of municipal law. As to him, the offence was merely *malum prohibitum*; as to British subjects, it was *malum in se*: and they had no right to complain if they were punished for it in any tribunal of their own country, however constituted. The cases of the Bothnea and the Jahnstaff,[c] and of the George,[d] in this Court, were also cases where the Court had undoubted prize jurisdiction, and the original owner being an enemy, could interpose no claim. The captor had been guilty of collusion with the public enemy, and had assisted him in violating the non-importation act. The Court, therefore, dismissed his libel, and condemned the property to the United

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a 4 *Rob.* 256. Note.
b 6 *Rob.* 341.
c 2 *Wheat.* 169.
d *Ib.* 278.

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States. A similar observation is applicable to the case of the Venus,[a] in which the joint claim of a citizen, and an alien, to the vessel, was rejected, on the ground that the former had made a false oath, in order to obtain a register, whereby she became liable to forfeiture under the registry act. The District Court of Louisiana, beside its Circuit Court powers, may exercise jurisdiction as a Prize Court, or an Instance Court of Admiralty. In neither of these capacities could it take cognizance of the present case. Not as a Prize Court: for the jurisdiction belonged exclusively to the Venezuelan tribunals. Nor as an Instance Court of the law of nations: since, as such, its decree could only be for restitution to the captors or to the original owners, according as our neutrality had or had not been violated. Nor as an Instance Court of municipal law, could it condemn the captured property of a friend before it had been declared good prize by a competent prize tribunal; unless perhaps where the owner or his agent had subjected his property to such a forfeiture by an offence against the municipal law, consummated before the capture. The proper course of proceeding, where there is no collusion between the captor and the former owner, is to punish those captors who attempt to violate our municipal laws in the same manner as those who violate our neutrality; that is, by dispossessing them of their prizes, and restoring them to the original proprietors. Such was the conduct of Holland on a similar omission, as

[a] 8 *Cranch*, 253.

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stated by Bynkershoek.[a] It is true, that he animadverts upon these ordinances of the States General; but his reflections will be found to be solely applicable to his own favourite notion of the right of belligerents to carry their prizes into neutral ports, and to

a The passage of Bynkershoek here alluded to is as follows: He begins by observing: "Although it be lawful, on national principles, to carry a prize into neutral territory, and there to sell it, if the captor thinks proper, laws have, nevertheless, more than once been made to the contrary." He then proceeds: "The States General, on the 9th of August, 1658, issued an edict, by which they ordered, that no foreign captor who might be compelled by stress of weather, or some other reasonable cause, to bring his prize into the ports of this country, should presume to sell any part of it, or even to break bulk, but that he should inform the bailiff of the place of his arrival, who, having placed a guard on board of the ship, should keep a strict watch over her, until her departure: inflicting, moreover, a discretionary penalty, and a fine of one thousand florins, on any one that should assist in unloading, or purchase any thing out of her. To which edict, the said States General, on the 7th of November, in the same year, enacted a supplement, by which it was ordered, that no prize ship should be brought into the port itself, but merely into the outer roads, where she might be sheltered from danger, and that nothing should be unladen or sold out of her; *and if any one should act to the contrary, the prize should be restored to the former owner, as though it had never been taken, and the captor himself should be detained, and his own vessel seized and confiscated.* The remainder of the edict merely confirms that of the 9th of August above mentioned. Whether those edicts were extorted from the States General by fear, or by any other cause, I do not know; but lest they should hereafter militate against national principles, we must declare, that we rather believe them to have been temporary than perpetual laws." *Bynk. Q. J. Pub. L. 1. p. 121. of Mr. Duponceau's translation.*

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sell them there, which has long since been exploded. The force of this historical example is not diminished by his criticism, founded, as it is, upon a false theory. In the case now before the Court, there can be no objection to restitution, on the ground of the traffic in which the original owners were engaged, being prohibited by the laws of their own country; for it is notorious, that Spain tolerates the trade. The principle, therefore, applied by the Lords of Appeal in England, to an American slave trader, in the case of the Amedie,[a] does not apply to this case. And Sir Wm. Scott, since the determination of the Lords, has decided, in the case of a Swedish vessel, that he would not condemn, because there was no positive proof, that Sweden had prohibited the trade, although it did not appear, that this State had ever sanctioned it, or that her subjects had been in the habit of carrying it on.[b] If it be said, that the condemnation rests on the act of Congress, and that this act is general in its terms, and makes no distinction as to the manner in which vessels violating the law may have been brought into our waters; it is answered, that, like all other penal laws, it must receive an equitable and liberal construction, and cannot be applied to cases of distress, or other cases of *vis major*.

The *Attorney General*, contra, argued principally upon the facts, to show, that the capture was collu-

[a] *Acton's Rep.* 240. *Edinburgh Rev. Vol.* 16. *No.* XXI. *p.* 486. *Wheat. on Capt.* 227.

[b] The Diana, *Dodson*, 95.

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sive, and that, consequently, the Court had jurisdiction to condemn the property to the United States, in a case where the captor and captured had combined in a scheme of fraud to defeat the execution of our municipal laws. He insisted, that even if this were not the fact, that the captors had by possession, *jure belli*, such a title to the property as rendered it liable to confiscation for any breach of our laws by the captors. Their title could only be devested by recapture, or by the sentence of a competent prize Court of their own country; and how improbable it was that such Court would dispossess them of it, is shown by the proofs and the pleadings in this cause, by which it appears, that the property was Spanish, and, therefore, liable to condemnation in the Prize Courts of Venezuela. The establishment of a contrary doctrine by the Court, would furnish an effectual recipe by which all our laws of trade might be violated with impunity; since it would be extremely difficult in many cases to show, that the capture was collusive, and in case of detection in the attempt to smuggle, the claimant would have nothing to do but to throw the blame upon the pretended captor, whilst in case of success, he would reap the fruits which might attend it. However ingeniously contrived such a scheme might be, it was the duty of the Court to penetrate through it, and when detected, to visit it with the penalty of confiscation.

Mr. Justice LIVINGSTON delivered the opinion of the Court, and after stating the facts, proceeded as follows: The third count of the libel is the only one

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that has any bearing on the present case. It alleges a violation of the seventh section of an act of Congress, prohibiting the importation of slaves into the United States, after the first day of January, in the year 1808, and which passed the 3d of March, 1807.

By this section it is enacted, "That if any ship or vessel shall be found, from and after the first day of January, 1808, in any river, port, bay, or harbour, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, having on board any negro, mulatto, or person of colour, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, every such ship or vessel, together with her tackle, apparel, and furniture, and the goods or effects which shall be found on board the same, shall be forfeited to the use of the United States, and may be seized, prosecuted, and condemned, in any Court of the United States having jurisdiction thereof. And the proceeds of all such ships and vessels, their tackle, apparel and furniture, and the goods and effects on board of them, which shall be so seized, prosecuted, and condemned, shall be divided equally between the United States and the officers and men who shall make such seizure, or bring the same into port for condemnation, and the same shall be distributed in like manner, as is provided by law for the distribution of prizes taken from an enemy: provided that the officers and men to be entitled to one half of the proceeds aforesaid,

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shall safe-keep every negro, mulatto, or person of colour, found on board of any ship or vessel so seized by them, and deliver them to such persons as shall be appointed by the respective States to receive the same," &c.

It is not denied, that the brig Josefa Segunda, shortly before her seizure, had been hovering on the coast of the United States, having on board a large number of persons of the description of those whose importation into this country is prohibited by the act: nor can there be any doubt, from the situation and circumstances under which she was found, and the manner in which she came within the jurisdictional limits of the United States, which appears to have been a voluntary act on the part of the prize master, that there is at least *prima facie* evidence of an intention to dispose of these people as slaves, or to land them in some port or place within the jurisdiction of the United States.

The claimants, aware of the necessity of accounting for circumstances, which, unexplained, could not but prove fatal to their interests, contend, in the first place, that the coming into the Mississippi was a matter of necessity, produced by the perilous situation of the vessel, and the famishing condition of the people on board: and that, therefore, neither she nor her cargo can be obnoxious to the provisions of the act of Congress. If the claim be not sustained on this plea; it is insisted,

In the next place, that the capture being illegal or piratical, the original owners cannot be affected by any of the acts of the prize crew; and,

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In the third place, it is asserted, that the vessel having been ransomed, and taken out of the hands of the captors, the claimants are restored to all their original rights, unimpaired by any acts on the part of the former.

Each of these claims for restitution will now be examined.

When any act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself, or his property, from the consequences of it, resorts to the plea of necessity or distress, the burthen of proof is not only thrown upon him; but when the temptation to infringe the law is great, and the alleged necessity, if real, can be fully and easily established, no Court should be satisfied with any thing short of the most convincing and conclusive testimony. The proofs before us, are so far from being of this character, that we look in vain for testimony of any serious disaster having befallen this vessel in her voyage from the Island of Cuba, to the Mississippi,—or for a calamity of any kind, which might not have been averted or prevented, had the master seriously and honestly endeavoured to reach the Island of Marguerita, which is now pretended to have been her real port of destination. That neither he, nor his employer, should have any great solicitude for the arrival of the prize at Marguerita, is easily accounted for, when it is recollected that this island, as well from its small extent, being not more than forty miles in length, and perhaps not more than half as broad, as from the scantiness and poverty of its population, could afford but a wretched, if

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any market at all for slaves; while at New-Orleans, each of them would produce the extravagant and tempting sum of one thousand dollars. It has not escaped the observation of the Court, that the General Arismendi, made the passage from Marguerita to the place of capture off the Island of St Domingo, in the short space of nine days; for the owner's letter of instructions to the Captain bears date at Marguerita on the 2d day of February, 1818, and on the 11th of the same month, the capture was made; and yet with the important fact before us, it is seriously contended, that a voyage which had just been made in nine days, could not be performed back again in six weeks. This is a possible case; but we ought not to be expected on slight grounds to believe that a vessel after leaving the Island of Cuba, in the latter end of February, should, on the 18th of April following, be found, not only several miles farther from her destined port than at the time of sailing, but that she had pursued this circuitous route in search of provisions: a story so improbable could hardly, under any circumstance, be entitled to belief; but it becomes absolutely incredible, when so many ports, more contiguous, and where supplies might easily have been obtained, were passed in her way to the Balize, without a single effort to procure a supply at any of them. Why not go to Kingston, in Jamaica, which was in the neighbourhood of the place where the capture was made, and to which port, the privateer went after making the capture? Her not going there can be accounted for on no supposition other than that of her being well suppli-

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ed with provisions at the time of her leaving Cuba. It is vain then to urge a plea, which is contradicted by the internal evidence of the case. If, however, it can be made out, that an attempt were really made to reach Marguerita, which was frustrated by adverse winds, or by any one of those disasters which so frequently occur on the ocean, or that the Josefa was forced by stress of weather so very far from the track of a direct voyage to that island, the claimant might still contend, that their plea of necessity had been made out. But, on this subject, there is an impenetrable obscurity, which it was their duty to remove. What winds, or what weather were encountered, we are not informed. No log book, from which alone, accurate and safe knowledge might be derived, is produced. A journal of that kind was not even kept, a circumstance which, of itself, excites a suspicion, which none of the testimony in the cause is calculated to dispel. But it is not necessary to pursue this inquiry farther, or to take notice of several minor circumstances which are relied on, and which so far from making out a case of real distress, only serve to confirm the view which has already been taken of the other evidence, and leave no reasonable doubt of the whole story being a fiction; or that the want of provisions, if real, at the time of seizure, was produced by a voluntary protraction of the voyage for the purpose, and with the intent of violating the law on which the present libel is founded. If, on testimony so vague, so contradictory, and affording so little satisfaction, this Court should award restitution, all the acts of Congress which

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have been passed to prohibit the importation of slaves into the United States, may as well be expunged from the statute book; and this inhuman traffic, for the abolition of which the United States have manifested an early and honourable anxiety, might, under the most frivolous pretexts, be carried on, not only with impunity, but with a profit which would keep in constant excitement the cupidity of those who think it no crime to engage in this unrighteous commerce. In the execution of these laws, no vigilance can be excessive, and restitution ought never to be made, but in cases which are purged of every intentional violation, by proofs the most clear, the most explicit and unequivocal.

But the claimants, not relying exclusively on the plea of necessity, contend, that the capture being piratical, and by a vessel having no commission, they ought not to be injured by any acts of the prize master which may be deemed infractions of the laws of the United States.

It would, indeed, be unreasonable and unjust, to visit upon the innocent owners of this property, the sins of a pirate; and were this allegation made out, the Court would find no difficulty in making the restitution which is asked for. But is it so; was the General Arismendi a piratical cruizer? The Court thinks not. Among the exhibits is a copy of a commission, which is all that, in such a case, can be expected, which appears to have been issued under the authority of the republic of Venezuela. This republic is composed of the inhabitants of a portion of the dominions of Spain in South America, who have

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been for sometime past, and still are, maintaining a contest for independence with the mother country. Although not acknowledged by our government as an independent nation, it is well known that open war exists between them and his Catholic Majesty, in which the United States maintain strict neutrality. In this state of things, this Court cannot but respect the belligerent rights of both parties; and does not treat as pirates, the cruizers of either, so long as they act under, and within the scope of their respective commissions. This capture, then, having been made under a regular commission of the government of Venezuela, the captors acquired thereby a title to the vessel and cargo, which could only be devested by recapture, or by the sentence of a Prize Court of the country under whose commission the capture was made. The Courts of neutral nations have no right to interfere, except in cases which do not embrace the present capture. The captors, therefore, at the time of the violation of our laws, must be regarded as the lawful owners of the property, and as capable of working a forfeiture of it, by any infraction on their part of the municipal regulations of the United States. The property, in the present case, not only belonged, at the time, to the captors, in virtue of the capture which they had made, but it is evident from the testimony and admissions in this cause, that it was owned at the time of capture by an enemy, and that a condemnation in a Prize Court of Venezuela was inevitable.

As little foundation is there for resting a claim to restitution on the ransom, which it is alleged took

place, of this vessel and cargo. This ransom, whether real or pretended, whether absolute or contingent, (about which, doubts may well be entertained,) cannot affect the rights of the United States. The forfeiture having attached before any ransom took place, could not be devested by any act between parties, conusant as these were, not only of the fact that a seizure had taken place for a violation of law, but that legal proceedings had been instituted, and were then carrying on, to obtain a sentence of condemnation founded on such violation.

Decree affirmed, with costs.

5 Wh. 359
145 389

(Local Law.)

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It is essential to the validity of a grant, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony to ascertain precisely what is conveyed.

Natural objects called for in a grant may be proved by testimony, not found in the grant, but consistent with it.

The following description, in a patent, of the land granted, is not void for uncertainty, but may be made certain by extrinsic testimony: "A tract of land in our middle district on the west fork of Cane Creek, the waters of Elk river, *beginning at a hiccory*, running north 1000 poles to a white oak, then east 800 poles to a stake, then south 1000 poles to a stake, thence west 800 poles to the beginning, as per plat hereunto annexed doth appear."

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The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose,

A general plan made by authority, conformably to an act of the local legislature, may also be submitted with other evidence to the jury, to avail, *quantum valere potest*, in ascertaining boundary.

But a demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act.

March 2d. THIS cause was argued by Mr. *Swann* and Mr. *Jones*, for the plaintiffs in error, and by the *Attorney-General* and Mr. *Kelly*, for the defendants in error.

March 13th. Mr. Chief Justice MARSHALL delivered the opinion of the Court. This was an ejectment brought in the Circuit Court of the United States, for the District of West Tennessee. The plaintiff made title, under a grant from the State of Tennessee, dated in 1808, which comprehended the land in controversy.

The defendants claimed under a patent from the State of North Carolina, dated in 1794, containing the following description of the land granted, viz. "A tract of land containing 5,000 acres, lying and being in our middle district, on the west fork of Cane Creek, the waters of Elk river, beginning at a hiccory running north 1000 poles to a white oak, then east 800 poles to a stake, then south 1000 poles to a stake, thence west 800 poles to the beginning, as per plat hereunto annexed doth appear."

For the purpose of designating the land described in this grant, the defendants then gave in evidence the plat and certificate of survey annexed thereto, a certified copy of the entry on which the grant was

issued, and the general plan or plat filed in the cause. They also proved, that this plan or plat was a correct representation of Cane Creek, of the west fork thereof, and of the land claimed by them. They also proved, that in 1806, prior to the entry on which the plaintiff's grant was issued, a survey had been made, and a corner hiccory and white oak, and lines around the said tract, (as the defendants then claimed) were marked; and, prior to the plaintiffs' entry, were esteemed by the people in the neighbourhood to have been marked as the defendants' land. The land in dispute lay within the territory ceded to the United States by the Indians, in 1806, and no actual survey thereof had been made previous to the emanation of the grant.

Upon this evidence, the counsel for the plaintiff requested the Court to inform the jury, that the said demarcation was not sufficient in law to locate the grant to the spot included in the said lines; and that the locality of the said lines could not legally be ascertained, either by the plat annexed to the grant, or by the entry or general plan; but the Court instructed the jury, that the said demarcation, entry, and general plan, might be used by them for that purpose.

The counsel for the plaintiffs excepted to this direction of the Court; and, a verdict and judgment having been given for the defendants, the cause is brought by writ of error before this Court.

As the first patentee was a fair purchaser of the quantity of land specified in his grant, and has placed his warrant, which was the evidence of that pur-

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chase, in the hands of the surveyor, a public officer designated by the State to survey the land intended to be granted; and as the land claimed under this grant, was actually surveyed and marked out before the plaintiff made his entry, so as to give him full knowledge of the title of the defendants, whatever that title might be; the plaintiff can put himself only on the strict law of his case. But to that strict law he is entitled.

It is contended, that the Circuit Court erred, 1st. Because the grant, under which the defendants claim, is absolutely void for uncertainty; and, consequently, no testimony whatsoever ought to have been admitted to give it locality.

That disposition, which all Courts ought to feel, to support a grant fairly made for a valuable consideration, receives additional force from the situation in which the titles to land in Tennessee are placed; and the Courts of that State have invariably carried construction as far as could be justified to effect this purpose.

It is undoubtedly essential to the validity of a grant, that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Almost all grants of land call for natural objects which must be proved by testimony consistent with the grant, but not found in it. Cane Creek, and its west fork, are to be proved by witnesses. So

the hiccory which is to constitute the beginning of a survey of a tract of land to lie on the west fork of Cane Creek. If, in the nature of things, it be impossible to find this hiccory, all will admit the grant must be void. But if it is not impossible, if we can imagine testimony which will show any particular hiccory to be that which is called for in the grant, then it is not absolutely void for uncertainty, whatever difficulty may attend the location of it.

Now suppose this grant to have been founded on actual survey; suppose the surveyor and chain carriers to go to the hiccory claimed by the defendants as their beginning, to show it marked as a beginning, to trace a line of marked trees from this beginning around the land, and to prove that this is the very land which was surveyed for the person in whose favour the grant issued. In such a case, the right of the defendants to hold the land would scarcely be questioned. Yet if the patent was void upon its face, these circumstances could not make it good. The grant purports to have been made on an actual survey; and the non-existence of that survey, though it may increase the difficulty of ascertaining the land granted, does not change the face of the instrument.

It has been said, that this patent does not call for a marked hiccory, and, therefore, no means exist of distinguishing it from any other hiccory. But it may have been marked by the surveyor, as corner trees are generally marked, without noticing the fact in the grant; and it is identity, not notoriety, which is the subject of inquiry.

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Could it even have been known by the patentee, or by those who might purchase from him, that the land had not been surveyed, yet a beginning corner might have been marked, and if the beginning be established, the whole tract is easily found.

We think, then, that testimony might exist to give locality to this grant, and, therefore, that it is not void on its face for uncertainty.

2d. We are next to inquire, whether improper testimony was admitted, and whether the Court misdirected the jury.

It has been determined in this Court, that the plat and certificate of survey, annexed to the patent, may be given in evidence; and it has been determined in the Courts of Tennessee, that a copy of the entry on which the survey was made is also admissible. In admitting these papers, then, there was no error. But the Court also admitted what is called a general plan, and a survey made prior to the plaintiff's entry of the land as claimed by the defendants.

The bill of exceptions does not so describe this general plan, as to enable the Court to say, with certainty, what it is. If it is a plan made by authority, in conformity with any act of the legislature, it may be submitted, with other evidence, to the consideration of a jury, to avail, as much as it may, in ascertaining boundary. But the Court has also permitted what is denominated a demarcation, which we understand to be a private survey made by direction of a party interested under the grant, and assented to by the defendants, to be given in evidence.

This private survey might have been made on any other part of the west fork of Cane Creek, with as much propriety as on that where it has been made. It would have been equally admissible if placed any where else on that stream. To allow it any weight, would be to allow the grantee to appropriate, by force of a grant, lands not originally appropriated by that grant. This would subvert all those principles relative to conveyances of land which we have been accustomed to consider as constituting immutable rules of property.

The legislature of Tennessee has certainly not supposed that any individual possessed this power of fixing vagrant grants. In the act of 1807, ch. 2. they have enacted, that any person claiming under a grant from the State of North Carolina, issued "on a good and valid warrant, the locality of which said grant cannot be ascertained, on account of the vagueness of the calls by the surveyor, or from the calls and corners of the said survey becoming lost or destroyed, or on account of the surveyor and chain carriers being deceased, so that the marks and corners cannot be established, shall be entitled to obtain a grant for the same quantity of land called for in said grant."

This liberal provision would have been totally unnecessary if the grantee might have remedied every uncertainty in his patent by his own act. If under his patent he might survey any vacant land he chose, the privilege of obtaining a new patent would be a very useless one.

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It is obvious, that the legislature did not suspect the existence of this power to make new boundaries where none before had been made, or where none could be found. Neither, as we understand the cases, has this principle been established by the Courts of Tennessee. The case relied on for this purpose, is the heirs and devisees of Williamson v. Buchanan, (2 *Ten. Rep.* 278.)

In this case, Judge White was of opinion, that the land was ascertained by the calls of the patent, without resorting to the survey and marks made subsequent to its emanation. Both his argument, and his language, in coming to this conclusion, indicate the opinion that Buchanan's claim to the land in controversy depended on it. After having come to this conclusion, however, he throws out some hints calculated to suggest the idea, that these modern marks might possibly have been considered, had the case required it, as the renewal of ancient ones which had been destroyed. But these hints seem rather to have been intended to alarm those who were taking up land held by others under ancient grants, whose boundaries were not accurately defined, except by those modern marks, than to give any positive opinion on the point. At any rate, these suggestions were made in a case where the patent, as construed by the Judge, called to adjoin the upper line of another tract, and its general position was, consequently, ascertained. In such a case, where the body of the land was placed, its particular boundaries might be ascertained by testimony which would not be deem-

ed sufficient where the patent contained no description which would fix its general position.

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Judge Overton, who also sat in this cause, gave more importance to the marks newly made; yet, his opinion too seems to be founded on the fact, that the body of the land was fixed by the description contained in the patent. "Before the plaintiffs made their entry," he said, "new marks for a corner were shown, running from which the courses of the grant, land would be included, sufficiently notorious in point of conformity with the calls of the grant. The general description, both of the entry and the grant, reasonably agrees with the locality of the land by these new marks." He then argues, that these new marks may be considered as replacing others which had been originally made.

The case, however, did not depend on this point, and it was not decided. Had it ever been decided, this Court would have felt much difficulty in considering a decision admitting marks as auxiliary evidence to prove precise boundary, in a case where the patent was admitted to contain a description sufficiently certain to place the body of the land, as authority for the admission of marks made by the party himself, in a case where the patent only places the land on a stream, with the length of which we are unacquainted.

We think, then, that the Circuit Court erred in instructing this jury, that they might use this demarcation for the purpose of ascertaining the land contained in the grant under which the defendants claimed, and for this error the judgment must be reversed.

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Mr. Justice JOHNSON dissented. The principal difficulties in this case, arise from the equivocal nature of the language in which the bill of exceptions is expressed. In that part of it which details the evidence offered, the words are, "that in 1806, or early in 1807, a corner hiccory, and a white oak, and lines around said tract, as now claimed and represented in said plat, were *marked.*" The word *marked*, may be taken either as an adjective, or a participle, and in the former sense it would mean, it was then a marked line. If this be its proper sense, it is impossible to doubt that the evidence was altogether unexceptionable. In this sense, I am inclined to think, the word ought to be taken, from reference to the context. For, one general object was to prove notoriety, or notice to the plaintiff, in order to affect him with the charge of obstinacy or folly in running a line which had already been surveyed. And the same inference results from its being stated a few lines after, "that no proof was given of any lines or corners having been marked before 1806:" A passage which would have been nugatory, if the word *marked* had been used as a participle of the verb *to mark;* for, the affirmance of the action at a specified time, would have implied a negation as to any other time.

But taking this word with its grammatical effect as a participle, then an ambiguity arises on a comparison of the charge prayed and the charge given, as expressed in the subsequent part of the bill of exceptions. For, the prayer is, "that the judge instruct the jury, that said demarcation was not in law

sufficient to locate said grant to the spot included in said lines; and, also, that the locality of said lands could not legally be ascertained, either wholly or in part, by the plat annexed to the grant, or by said entry, a copy whereof is annexed as aforesaid, or by said general plan; but the said Judge instructed the jury, that the said demarcation *might be used for that purpose* by the jury, and, also, that the plat aforesaid might be used by them, and the said entry, also, and the said general plan *for the same purpose.*"

If the instruction prayed was, that the demarcation, as it is called, considering it as the act of an indifferent person, had not the effect of an original survey, in defining, or laying off to the defendant the land which it embraced, there cannot be a doubt, that he was entitled to that charge, and it was error in the Court not to have given it. But I am of opinion, that it cannot be so understood; for, there is no refusal to give the instruction prayed, and a different instruction given; but the words of the instruction are calculated to express a direct negation of the proposition maintained by the plaintiff. It is obvious, from the language of the charge, that the Court considers the instruction prayed, as in the same degree applicable to every item of the evidence tendered; and I am, therefore, sanctioned in assuming, that the charge did not go to the legal effect of the demarcation, but asserted, that evidence of its having been made, and where it was made, with reference to the conflicting lines of the parties, was proper to go to the jury. Under this view of the subject, I

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cannot see how it was possible, unless the grant was void, to withhold it from the jury, when pursuing the inquiry into which they were called to enter. The grant conveys a specified quantity of land, and the *locus in quo* is the only question to be decided. A reference is made by the grant to a plat annexed, and the defendant must prove, that the land he holds conforms in description to the original plat. He must, of course, show what land he does hold, and this can only be done by reference to his marked line. The conformity of the demarcation to the original plat is a subsequent and subordinate question, and one which the jury must decide on, according to the evidence which shall be adduced to that point. But how to introduce it without referring to the defendant's line, I cannot perceive.

I cannot subscribe to the opinion, that the idea is for a moment to be tolerated, that there is any thing fictitious or unreal in the plat attached to the solemn grant of the State. It bears upon its face the only evidence which ought to be required, and evidence, in my opinion, which ought not to be contradicted, that a survey actually was made. Nor are marked trees or boundaries indispensable to such a survey; though the lines had been traced out on the soil, or stepped off to the grantee, the grant would attach to the designated spot with all the force that would have been given to it by a fence or a wall. Identity is the only question to be decided by a jury, and if they can be satisfied that the land held by the defendant is the same land which was granted to him, it is all that should be required. At least, early

grants should have the benefit of these principles as against those who interfere with existing lines. And this I understand to be the received doctrine of the Courts of Tennessee. (Smith v. Buchanan, 2 *Ten. Rep.* 308.)

It will be perceived, that the sufficiency of the evidence in this case to establish the *locus in quo*, is not the question. If the verdict was founded on evidence which could not support it, that might have been considered below, on a motion for a new trial. But the single question which the case presents is, whether the evidence here tendered was proper circumstantial evidence to go to the jury, in order to establish the *locus in quo*. The answer of the Court is, that it *may be used for* that purpose. And, in my opinion, unless it ought to have been rejected altogether on the ground of invalidity of the grant, it was all properly admitted for that purpose; not on the idea that the demarcation operated at all in conveying the estate, but as a necessary preliminary to the whole evidence. Respecting the entry, there can be no doubt; and all the rest was calculated to prove that these lines were marked at an early day, and engrafted upon a general survey of the county, made under an act of the legislature, for the purpose of exhibiting the relative position of estates claimed in the county. This showed the early and continued claim of the defendant; and whether his possession was of the same land which had been granted to him by the State, remained for the jury to decide, upon such evidence as the nature of the case required. Facts may have existed in their own knowledge of the

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country, or been brought to their notice from the testimony of others, or may even have been gathered from the face of the plat, and reference to natural objects.

We know the manner in which this country has been sold and settled, and the necessity of yielding a liberal acquiescence to the claims of early grants. So strongly am I impressed with this opinion, that I see no reason why a grant may not have the effect of a standing warrant of survey, as long as the land, purporting to have been surveyed, shall remain unoccupied. It is doing no injury to the individual right; and the State having received a compensation, and pledged itself for the conveyance of a certain quantity of land, sustains no injury, where the survey is reasonable, and bearing a subsequent conformity to the grant and survey under which the claim is asserted.

In the case before us, it is obvious that the survey offered in evidence was made with reference to the Creek, as traced upon the original plat. It does not, it is true, conform to the entry in commencing at the mouth of the west fork, which is obviously the true construction of the entry, but it embraces the mouth of the west fork, and conforms to natural objects. And this appears to be sufficient under the decisions of this Court, and the liberal principles admitted in Tennessee in surveying upon entries. (M'Ivers' Lessee v. Walker and Lassiter, 9 *Cranch*, 173, and 2 *Ten. Rep.* 66. *et passim.*) At least, I presume the evidence in this case was all properly used toward establishing the right to that part of

the defendant's land which lay above the mouth of the west branch of Cane Creek, with reference to which part the survey might well be supported by his entry; and if it was legally admitted as to any part, the instruction of the judge ought to be sustained.

It has been urged, that this idea precludes the necessity of those statutory provisions of Tennessee, which permit the holders of grants on which the lands cannot be located to lay their warrants upon other land.

I confess I cannot see the force of this argument; for it is not contended, that an individual survey will give any strength to a title otherwise defective, or cure any inherent vice in the original survey. If the plat attached to the grant has reference to nothing from which its locality can be determined, it is not pretended, that an individual, or private survey, will make it better. On the contrary, the defence is founded upon the supposition, that the cases provided for by those laws, is not this case; that the land admits of being identified, and is that which the defendant has marked off. It would be curious if other Courts should decide that the defendant's case was not provided for because it had locality, while we are deciding, that it is provided for because it has no locality. He would then have no consolation for the necessity of abandoning his "*dulcia arva*," and becoming the "*novus hospes*" of some other resting place.

Judgment reversed

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JUDGMENT. This cause came on to be heard on the transcript of the record of the Circuit Court for the district of West Tennessee, and was argued by counsel. On consideration whereof, this Court is of opinion, that the Circuit Court for the district of West Tennessee erred in instructing the jury, that they might use the demarcation, in the bill of exceptions and opinion of the Court mentioned, for the purpose of ascertaining the land contained in the grant under which the defendant claimed. It is, therefore, ADJUDGED and ORDERED, that the judgment of the said Circuit Court in this case be, and the same is, hereby reversed and annulled. It is further ORDERED, that the said cause be remanded to the said Circuit Court, with directions to issue a *venire facias de novo*.

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(LOCAL LAW.)

HANDLY'S Lessee v. ANTHONY *et al.*

The boundary of the State of Kentucky extends only to low water mark on the western or northwestern side of the river Ohio; and does not include a peninsula, or island, on the western or northwestern bank, separated from the main land by a channel or bayou, which is filled with water only when the river rises above its banks, and is, at other times, dry.

When a river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this

case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly erected State extends to the river only, and the low water mark is its boundary.

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THIS cause was argued by the *Attorney-General* for the plaintiff, and by Mr. *B. Hardin* for the defendants in error. *March 4th.*

Mr. Chief Justice MARSHALL delivered the opinion of the Court. This was an ejectment brought in the Circuit Court of the United States for the District of Kentucky, to recover land which the plaintiff claims under a grant from the State of Kentucky, and which the defendants hold under a grant from the United States, as being part of Indiana. The title depends upon the question whether the lands lie in the State of Kentucky, or in the State of Indiana. *March 14th*

At this place, as appears from the plat and surveyor's certificate, the Ohio turns its course, and runs southward for a considerable distance, and then takes a northern direction, until it approaches within less than three miles, as appears from the plat, of the place where its southern course commences. A small distance above the narrowest part of the neck of land which is thus formed, a channel, or what is commonly termed in that country a bayou, makes out of the Ohio, and enters the same river a small distance below the place where it resumes its westward course. This channel, or bayou, is about nine miles by its meanders, three miles and a half in a straight line, and from four to five poles wide. The circuit made by the river appears to be from

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fifteen to twenty miles. About mid-way of the channel two branches empty into it from the north-west, between six and seven hundred yards from each other; the one of which runs along the channel at low water, eastward, and the other westward, until they both enter the main river. Between them is ground over which the waters of the Ohio do not pass until the river has risen about ten feet above its lowest state. It rises from forty to fifty feet, and all the testimony proves that this channel is made by the waters of the river, not of the creeks which empty into it. The people who inhabit this peninsula, or island, have always paid taxes to Indiana, voted in Indiana, and been considered as within its jurisdiction, both while it was a Territory, and since it has become a State. The jurisdiction of Kentucky has never been extended over them.

The question whether the lands in controversy lie within the State of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that State to the United States.

Both Kentucky and Indiana were supposed to be comprehended within the charter of Virginia at the commencement of the war of our revolution. At an early period of that war, the question whether the immense tracts of unsettled country which lay within the charters of particular States, ought to be considered as the property of those States, or as an acquisition made by the arms of all, for the benefit of all, convulsed our confederacy, and threatened its existence. It was probably with a view to this question that Virginia, in 1779, when she opened her

land office, prohibited the location or entry of any land "on the northwest side of the river Ohio."

In September, 1780, Congress passed a resolution, recommending "to the several States, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the Union." And in January, 1781, the Commonwealth of Virginia yielded to the United States "all right, title, and claim, which the said Commonwealth had to the territory northwest of the river Ohio, subject to the conditions annexed to the said act of cession." One of these conditions is, "that the ceded territory shall be laid out and formed into States." Congress accepted this cession, but proposed some small variation in the conditions, which was acceded to; and in 1783 Virginia passed her act of confirmation, giving authority to her members in Congress to execute a deed of conveyance.

It was intended then by Virginia, when she made this cession to the United States, and most probably when she opened her land office, that the great river Ohio should constitute a boundary between the States which might be formed on its opposite banks. This intention ought never to be disregarded in construing this cession.

At the trial, the counsel for the defendants moved the Court to instruct the jury,

1. That the lessor of the plaintiff cannot recover, the land in contest not being at any time subject to the laws of Kentucky, but to those of Indiana.

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2. Because the evidence does not show that the land is within the limits of the State of Kentucky.

The Court instructed the jury that, admitting that the western and northwestern boundary of Kentucky included all the islands of the Ohio, and extended to the western and northwestern bank of the Ohio, yet no land could be called an island of that river, unless it was surrounded by the waters of the Ohio at low water mark; and to low water mark only, on the western or northwestern side of the Ohio, did the boundaries of the State of Kentucky extend.

The counsel for the plaintiff excepted to this opinion, and then moved the Court to instruct the jury, that if they found the land in question was covered by the grant to the lessor of the plaintiff, and that it was surrounded by a regular water channel of the Ohio on the northwestern side, and was, at the middle and usual state of the water in the Ohio, embraced and surrounded by the water of the Ohio, flowing in said channel, it was an island, and within the State of Kentucky. But the Court refused to give the instructions aforesaid, but instructed the jury, that if the water did not run through said channel at low water, but left part thereof dry, it was not an island, nor within the State of Kentucky.

To this opinion, also, the counsel for the plaintiff excepted. The jury found a verdict for the defendants, on which the Court rendered judgment; which judgment is now before this Court on a writ of error.

The two exceptions present substantially the same questions to the Court, and may therefore be con-

sidered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and northwest by the low water mark of the river, or at its middle state? or, in other words, whether the State of Indiana extends to low water mark, or stops at the line reached by the river when at its medium height?

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory "situate, lying, and being, to the northwest of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary.

"In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other

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limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

"If," says the same author, "the country which borders on a river, has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion."[a]

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed, and land formed by the receding of the water. If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find

[a] *L.* 1. *c.* 22. § 268.

itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark.

When the State of Virginia made the Ohio the boundary of States, she must have intended the great river Ohio, not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low water mark.

The opinions given by the Court must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana; and the title depended entirely upon that question. The definition of an island which the Court was requested to give, was either an abstract proposition, which it was unnecessary to answer, or one which was to be answered according to its bearing on the facts in the cause. The definition of an island was only material, so far as that definition might aid in fixing the boundary of Kentucky. In the opinion given by the Court on the motion made by the counsel for the defendants, they say, that "no land can be called an island of the Ohio, unless it be surrounded by the waters of that river at low water mark." We

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are not satisfied that this definition is incorrect, as respected the subject before the Court; but it is rendered unimportant, by the subsequent member of the sentence, in which they say, "that to low water mark only, on the western and northwestern side of the Ohio, does the State of Kentucky extend."

So, in the motion made by the counsel for the plaintiff, the Court was requested to say, that if the waters of the Ohio flowed in the channel, in its middle and usual state, it was not only an island, but "within the State of Kentucky."

If the land was not within the State of Kentucky, the Court could not give the direction which was requested. The Court gave an instruction substantially the same with that which had been given on the motion of the defendant's counsel.

If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that State can be determined only by the river itself. The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one State, or the other.

There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the State of Indiana would extend to low water mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water?

So far as respects the great purposes for which the river was taken as the boundary, the two cases

seem to be within the same reason, and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last mentioned State, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the State on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.

If a river, subject to tides, constituted the boundary of a State, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory would scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the property of the river. The principle that a country bounded by a river extends to low water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this.

The case is certainly not without its difficulties; but in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived,

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ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate State, the river was the boundary between the new States erected by Congress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. They seem to us to require, that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.

It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last mentioned State. No diversity of opinion appears to have existed on this point. The water on the north western side of the land in controversy, seems not to have been spoken of as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the north western side of the Ohio, and being a part of Indiana.

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The compact with Virginia, under which Kentucky became a State, stipulates, that the navigation of, and jurisdiction over, the river, shall be concurrent between the new States, and the States which may possess the opposite *shores* of the said river. This term seems to be a repetition of the idea under which the cession was made. The shores of a river border on the water's edge.

Judgment affirmed, with costs.

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(PRIZE.)

LA AMISTAD DE RUES.—*Almiral*, Libellant.

Quære, Whether, where a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize and bring it into our ports for adjudication?

In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages.

In cases of violation of our neutrality by any of the belligerents, if the prize comes *voluntarily* within our territory, it is restored to the original owners by our Courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages as in ordinary cases of marine torts.

Where the original owner seeks for restitution in our Courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the Court will decline to exercise its jurisdiction.

APPEAL from the District Court of Louisiana.

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This was the case of a Spanish ship captured by the Venezuelan privateer La Guerriere, on the high seas, in November, 1817, and afterwards forcibly taken possession of near the mouth of the Mississippi, by a detachment from the United States ketch Surprise, and brought into the port of New-Orleans. A libel was there filed in the District Court, in behalf of the original Spanish owners, claiming restitution of the property, upon the ground, (among other things,) that the privateer had augmented her crew in the United States, during the cruise, and before the capture. A claim was given in by the original captors, denying the allegations in the libel, and praying restitution of the property as lawfully captured. At the hearing in the District Court, the cause turned almost entirely upon the question of the augmentation of the crew, and the Court decreed restitution of the property to the original Spanish owners with damages, which were ordered to be ascertained by assessors. The assessors reported damages as follows: to the owners of the ship for loss by plunder, $625 00
and to the owners of the cargo for loss of market by the capture, 4000 00
and loss by plunder, 575 00

in the whole, $5,200 00

The report was confirmed by the Court, and damages decreed accordingly. From this decree, the captors appealed to this Court.

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March 8th.

Mr. *C. J. Ingersoll*, for the appellants, argued upon the facts, to show that there was no sufficient evidence to prove that the privateer had augmented her force in the ports of the United States. He insisted, that the burthen of proof to establish this fact rested with the original Spanish owners, who claimed restitution upon it; and that they had not shown, beyond all reasonable doubt, to the satisfaction of the Court, that the captors had increased their armament in violation of our neutrality. He also argued, that supposing the misconduct on the part of the captors ever so clearly established by the evidence, the jurisdiction of our Courts does not extend to the infliction of vindictive damages for their offence, but is limited by the law of nations to restitution of the specific property illegally captured. To carry it further, would be to assume the entire prize jurisdiction with all its incidents, which is exclusively vested in the Courts of the captor's country. At all events, it is well established, that the probable profits of a voyage is not a fit rule for the assessment of damages in cases of marine torts, and even upon that ground alone the decree must be reversed.

The *Attorney-General*, contra, insisted, that the evidence of an illegal augmentation of the force of the privateer in our ports, was sufficiently established by the evidence. He argued, that where the neutrality of our ports is violated in this manner, and the property captured is brought within our territory, the Courts of this country, proceeding *in rem*, are bound not merely to restore the specific property

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to the original owners, but to restore it with costs and damages, as in an ordinary case of illegal seizure. Being possessed of the principal question of prize or no prize, that necessarily draws after it all incidental questions; and the one is no more an invasion of the exclusive jurisdiction of the belligerent Prize Courts than the other. The neutral tribunal having taken jurisdiction for the purpose of vindicating the neutrality of its own country, by placing things in the same state they would have been in, had not that neutrality been violated,—can only do complete justice between the parties, by inflicting upon the captors such damages as will afford the original owners an indemnity for the loss they have sustained.

March 14th. Mr. Justice STORY delivered the opinion of the Court, and, after stating the facts, proceeded as follows. We pass over the question, whether, supposing there was an illegal augmentation of the crew of the privateer in our ports, the American captors had any right forcibly to bring in the prize for adjudication. It is an important question, and when it shall be necessary to decide it, it will deserve serious consideration. The present cause may well be disposed of without any discussion concerning it.

Two questions have been made at the bar. 1. Whether, in point of fact, the illegal augmentation of the crew is so established as to entitle the Spanish libellants to restitution. 2. If so, whether the damages were rightfully awarded.

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The last question will be first considered. And as to the item of damages for loss of market, we are all of opinion that it is clearly inadmissible. In cases of marine torts, this Court have deliberately settled, that the probable profits of a voyage are not a fit mode for the ascertainment of damages.[a] It is considered that the rule is too uncertain in its own nature, and too limited in its applicability, to entitle it to judicial sanction. The same principle must govern in the present case.

The probable profits of a voyage not a proper rule for the ascertainment of damages in cases of marine torts.

But a more general objection is to the allowance of any damages in cases of this sort, as between the belligerents. The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognised by the act of Congress of 1794. But this Court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in the ordinary cases of marine torts. We entirely disclaim any right to inflict such

Extent of the jurisdiction of neutral Courts in cases of a violation of neutrality.

a The Amiable Nancy, 3 *Wheat.* 546.

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damages; and consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. Strictly speaking, there can be no such thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of *judicial* complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own Government exclusively, for any excess or irregularity in their proceedings; and a neutral nation ought no otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. Neutral nations may, indeed, inflict pecuniary, or other penalties, on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports; but beyond this it is not obliged to interpose between the belligerents. If indeed it were otherwise, there would be no end to the difficulties and embarrassments of neutral prize

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tribunals. They would be compelled to decide in every variety of shape upon marine trespasses *in rem*, and *in personam*, between belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of foreign witnesses; and thus they would draw within their jurisdiction almost every incident of prize. Such a course of things would necessarily create irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties. Considerations of public policy come therefore in aid of what we consider the law of nations on this subject; and we may add, that Congress in its legislation has never passed the limit which is here marked out. Until Congress shall choose to prescribe a different rule, this Court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquiries into questions of damages for asserted wrongs. The decree for damages is, therefore, unhesitatingly reversed.

Onus probandi, in cases where restitution is claimed by the original owners upon the ground of an illegal armament in our ports, rests upon them.

The other question presents more difficulty. It must be admitted, that there is positive testimony directly to the point of the illegal augmentation of the crew of the privateer; and if it stood uncontradicted, and were liable to no deduction, the libellant would certainly be entitled to restitution. But the testimony as to the augmentation, comes chiefly from very obscure persons, and is, in itself, in many respects, loose and equivocal; and that of one, at least, of the principal witnesses, is, in a most material fact,

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directly contradicted by a written document, whose verity has not been questioned. It is proved, by the report of an inspector made to the custom house, that at the arrival of the privateer in port, she had on board 49 men; yet, the witness alluded to, expressly alleges, that at the time of her arrival at New-Orleans, she had not more than ten or twelve persons on board. It appears, too, that the crew of the privateer was wholly composed of foreigners, principally persons from the Spanish Maine, and from St. Domingo. Being arrived at New-Orleans in the course of a cruize, which is not proved to have ended there, the natural presumption is, that her original crew continued attached to her; and this presumption is considerably fortified by the fact, that though the officers of the custom house of that port vigilantly inquire into cases of this nature, there is nothing in their testimony, that in the slightest degree affects the conduct of the privateer in an unfavourable manner. It certainly cannot be said, that the evidence is free from all reasonable doubt. And, in cases of this nature, where the libellant seeks the aid of a neutral Court to interpose itself against a belligerent capture, on account of a supposed violation of neutrality, we think the burthen of proof rests upon him. To justify a restitution to the original owners, the violation of neutrality should be clearly made out. If it remains doubtful, the Court ought to decline the exercise of its jurisdiction, and leave the property where it finds it. We cannot say that the present case is clear from reasonable doubt; and,

therefore, we reverse the decree of the District Court, and order restitution to be made to the original captors; but, under all the circumstances, the parties are to bear their own costs.

Decree reversed.

DECREE. This cause came on to be heard on the transcript of the record of the District Court of the United States for the district of Louisiana, and was argued by counsel. On consideration whereof, it is DECREED and ORDERED, that the decree of the said District Court, in this case, be, and the same is, hereby reversed and annulled. And this Court, proceeding to pass such decree as the said District Court should have passed, it is further DECREED and ORDERED, that the libel be dismissed, and the said ship La Amistad, her tackle, apparel, and furniture, and cargo, be restored to the claimants. And it is further ORDERED, that each party pay their own costs.

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(Common Law.)

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Where claims against a party, both in his own right, and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award, that it does not precisely distinguish between moneys which are to be paid by him in his representative character, and those for which he is personally bound.

An award may be void in part, and good for the residue. But if the part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.

Error to the Circuit Court for the district of Columbia.

This was an action of debt against the defendant, on a bond given by Jerusha Dennison, and the defendant, to the plaintiffs, with a condition to perform the award of certain persons chosen to arbitrate all differences, &c. between the plaintiffs and Jerusha Dennison, either as administratrix of Gideon Dennison, deceased, or in any other capacity. The condition of the obligation is in these words: "Whereas the said Jerusha Dennison, and the said James Lyle and Joshua B. Bond, have agreed to refer all matters in dispute between them, to the award and arbitrament of David Winchester and Thomas Tenant, of the city of Baltimore; and in case they differ in opinion, then to them and such third person as the said David Winchester and Thomas Tenant shall choose and appoint. Now, the condition of the obligation is such, that if the above bound Jerusha Dennison, her heirs, executors and administrators, do, and shall well and truly stand to, abide by, and keep the award and arbitrament of the said

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David Winchester and Thomas Tenant, arbiters, indifferently named and appointed by them to arbitrate, award, and adjudge of, and concerning all actions and causes of actions, debts, dues, controversies, claims or demands whatsoever, both at law and in equity, which the said James Lyle and Joshua B. Bond have, or either of them hath, against her the said Jerusha Dennison, as administratrix of Gideon Dennison, or in any other capacity. Or in case the said arbitrators shall differ in opinion, if then the said Jerusha Dennison, her heirs, executors and administrators, and every of them, do, and shall stand to, abide by, perform and keep the award and arbitrament of them the said David Winchester and Thomas Tenant, or either of them, and of such discreet and indifferent person as they shall elect and appoint as a third person as aforesaid; then this obligation to be void, and of none effect, otherwise to be and remain in full force and virtue."

Upon this submission, the following award was made: "Whereas certain differences have arisen between Joshua B. Bond and James Lyle, of the city of Philadelphia, in the State of Pennsylvania, of the one part, and Jerusha Dennison, of Harford county, in the State of Maryland, of the other part; and whereas, for the purpose of putting an end to the said differences, the said parties, by their several bonds, bearing date the fifteenth day of November last past, have reciprocally become bound, each to the other, in the penal sum of 12,000 dollars, current money of the United States, to stand to, abide by, perform, and keep the award of David Winches-

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ter and Thomas Tenant, arbiters indifferently named and appointed to arbitrate, adjudge, and award of, and concerning all actions, or causes of actions, debts, dues or demands, whatsoever, both of law and in equity, which the said Joshua B. Bond, and James Lyle, or either of them, have against the said Jerusha Dennison, as administratrix of Gideon Dennison, or in any other capacity:

"Whereupon, we, the above named arbitrators, after having heard the allegations of the parties, proceeded to an examination of the accounts, documents and proofs, by them respectively produced, and having maturely considered the same, do adjudge and award in manner and form following:

"First. We do adjudge and award, that there is due from Jerusha Dennison to Joshua B. Bond and James Lyle, the sum of 8,726 dollars and 41 cents, with interest from this date, until paid; upon the payment whereof, all suits at law and in equity, between them, shall cease and determine. And,

"Second. We do adjudge and award, that upon the payment by the said Jerusha Dennison, of the sum above awarded, with interest, as aforesaid, the said Joshua B. Bond and James Lyle shall execute to the said Jerusha Dennison, a good and sufficient release of all claims against her, both in her private capacity, and as administratrix of the late Gideon Dennison; and, also, that they shall re-convey, or release, as the case may require, all lands heretofore conveyed or pledged to them by the late Gideon Dennison, as a collateral security; and further, that they shall deli-

ver to the said Jerusha Dennison, or account for on oath, all bonds, notes, bills, or other securities heretofore given to them by the late Gideon Dennison, as collateral security:—And,

"Lastly. We do adjudge and award, that this award shall be conclusive between the parties."

The sum awarded by the arbitrators not having been paid, this suit was instituted. The defendant, after praying oyer of the bond, and of the condition, pleaded no award. The plaintiffs, in their replication, set forth the award, and assigned as a breach of it, the non-payment of the sum of 8,726 dollars and 46 cents, with interest, awarded to be due to them from the said Jerusha Dennison. The defendant rejoined, that among the matters in dispute between the parties, was a dispute relating to certain lands conveyed in fee simple by Gideon Dennison, the intestate of the said Jerusha Dennison, to the plaintiffs, in his lifetime, without any condition or defeazance expressed therein, but with an understanding and agreement between them, that the same should be held by the plaintiffs as a collateral security for the payment of whatever debt was due from the said Gideon Dennison to the plaintiffs. And, also, as to certain other lands and land titles, pledged in like manner as a collateral security for the said debt. But because the said matters in dispute are left unsettled by the said award, and for other causes appearing on the face of the said submission and award, the arbitrators made thereon no award, &c.

To this rejoinder the plaintiffs demurred, and the defendants joined in demurrer. It was, however,

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afterwards agreed between the parties, that instead of arguing the demurrer, the matter contained in the foregoing pleadings, and the law arising thereon, should be subject to the opinion of the Court, on a statement of facts made by the parties, and the questions stated as arising thereon.

This statement admits the submission, the appearance of the parties before the arbitrators, the award, due notice thereof, a demand of the sum awarded to be due, and a refusal to pay the same. The statement also contains certain letters which passed between the plaintiffs and Jerusha Dennison, and Samuel Hughes, acting for and in behalf of the said Jerusha, dated in 1799 and 1800; and, also, a letter from the plaintiffs, dated in 1800, addressed to Mr. Hollingsworth, a lawyer of Baltimore, containing a copy of the correspondence above mentioned, and transmitting him a note for 5,568 dollars, drawn by Gideon Dennison in his lifetime, of which the plaintiffs were holders, and which had been regularly protested. On this note, Mr. Hollingsworth was requested to take the proper means to obtain payment. The correspondence admitted, that "grants of lands in North Carolina and Tennessee had been given as security, without any acknowledgment or receipt for the same;" but contained no information whatever, ascertaining what grants were so given, although full information on that subject had been requested on the part of Jerusha Dennison.

March 11th. Mr. *Jones*, for the plaintiffs, stated, 1. That the first objection made to the award by the defendant was,

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that the arbitrators had not determined all the matters in controversy between the parties. But the only evidence to support this allegation is inadmissible and insufficient for that purpose; and the arbitrators have done enough if they decide all that the parties submit to them. 2. It is also objected, that the administratrix could not submit differences relative to her intestate's estate to arbitration. But the right of executors and administrators to submit to arbitration is well established by authorities, and the submission is an admission of assets to the extent which may be awarded; or, rather, it is a personal engagement to pay whatever the arbitrators may direct, without regard to the question of assets.[a] 3. But it is again objected, that the award is void for uncertainty. To which it is answered, that the universality of the award is advantageous to the defendant, and that a general release, such as the award contemplates, is the best release for him. In the old cases, the judges employed all their astuteness to defeat awards; but in the progress of society, they have been justly viewed with more favour, and many things are now deemed certain which were formerly considered incurably bad. It is not necessary that every thing should be stated with positive certainty in the award itself. It may be rendered certain by reference *aliunde*. The question is, whether the party has a certain and definite remedy. Here the defendant may show that certain deeds have been executed, and are not released. It is sufficiently certain

a Barry v. Rush, 1 *T. R.* 691. Pearson v. Pearson, 5 *T. R.* 6.

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what bonds, &c. may be delivered up. It is within the knowledge of the parties. If the plaintiffs should attempt to sue upon other securities, the award might be pleaded in bar, with an averment that they were meant to be included.[a] As to the alternative part of the award, to deliver up the papers, *or* account for them on oath; an alternative award is good, if certain.[b] This is sufficiently certain. They shall deliver them up, or disclose where they are. Why might not the arbitrators direct the bonds, &c. to be accounted for on oath, instead of being actually delivered up?

Mr. *Pinkney* and Mr. *Key*, contra, contended, 1. That the award was of a controversy about lands, which the administratrix, in her representative character, was not competent to submit to arbitration. That this was the nature of the controversy appears from the letters offered in evidence, which are competent evidence of what was in dispute. It appears also from the award itself. But this award is no proof of assets. That question was referred to the arbitrators. If they say the money shall be paid, it finds assets; otherwise, if they only decide that so much is due. But they have not decided either, as to J. Dennison in her representative character. 2. The award finds a sum due from J. Dennison, but does not say that she shall pay it. Now, the arbitrators may have intended merely to liquidate the claim, leaving it to her to pay it or not, as she might, or might

a *Kyd on Awards*, 205, and the cases there cited.
b *Id.* 203.

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not be satisfied with the restoration by the plaintiffs of the property pledged. The Court will not intend that it was meant that she should pay, whether they offered to restore the pledges or not. And even if this were doubtful, it adds another objection upon the ground of uncertainty. 3. There are several other uncertainties. It is uncertain *what* "lands" are meant: and they are to be reconveyed or released "as the case may require." Who is to judge what the case may require? If the arbitrators had said who should judge, it would even then be void; for it is a judicial act which they could not delegate to any one.[a] The lands are to be "released." But to whom? The award does not state. They are to deliver "*all* bonds," &c. heretofore given to them by the late G. Dennison as collateral security." But they are not specified, and this is a fatal defect.[b] Again; They are required to deliver them, or account for them "on oath." Here it is left uncertain *how* they are to account for them on oath. It is said that it means that they shall disclose where they are. But what good will this do the administratrix, if she does not get them? If the plaintiffs knew where the securities were, the arbitrators ought to have compelled their production. If they do not know, what good will their oath do us? But perhaps it may be said, that it means that they shall account on oath for their value. This, indeed, would be more rea-

a *Kyd on Awards*, 127.

b Pope v. Brett, 2 *Saund.* 292. Ross v. Hodges, 1 *Ld. Raym.* 234.

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sonable, than merely telling us where they were: and if this was the intention of the arbitrators, they ought to have valued them, and could delegate this power to no other person, much less to a party. Suppose it to mean either, the award is void. And it is void for uncertainty, because it may mean either. It is admitted, on the other side, that an award must be certain on its face, or refer to something by which it may be made certain. Now this award is full of uncertainties on its face, and refers to nothing by which they can be explained. It is said that it refers us to a knowledge of the parties. But that is not sufficient. The case cited from Lord Raymond,[a] was between mortgagor and mortgagee, who may be presumed to know, and there was no dispute as to facts: but here it is the case of an administratrix who did not know, and a part of the dispute was what was pledged. All these uncertainties are left to be determined by the plaintiffs, who are to return whatever they may choose. But we have the same right to the pledges which they have to the debt, and the value or amount of neither should be left to the parties. Suppose the award had been, that one party should return all the pledges, and the other should pay all the money borrowed. Here would have been the same uncertainty, but it would have been reciprocal: and if an award that one party should pay all that was lent, or account on oath for all that was lent, would be a nullity; an award that the other party shall return all the pledges, or account for them

[a] *Ld. Raym.* 234.

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on oath, is equally void. The rules relative to awards have been derived from the civil law, and that law deems them void upon the same ground of uncertainty.[a] This award decides nothing, or what is the same thing, it decides what was unimportant, and leaves all that was material to be taken *ad referendam*. It does not state in what character J. Denison is indebted to the plaintiffs. The award ought to show the character in which she is chargeable. It is impossible to charge the debt on the estate. If this award had been against her in her representative character, and it had simply declared a debt due from her intestate, specifying the amount, she might have pleaded *plene administravit*. Otherwise, if it had declared that she should pay a certain sum. But it has done neither, and the award is, therefore, void for uncertainty. The great object of the arbitration was, to ascertain what deeds were in fact mortgages, though purporting to be absolute conveyances; and what bonds, &c. were pledged, the plaintiffs not having admitted them. It was designed to ascertain the doubtful equitable circumstances of the case; every thing, in short, which the arbitrators have forborne to decide. The award recognises the existence of these conveyances and pledges, but does not ascertain them, nor provide any mode of ascertaining them. It was not general, but specific relief, which was expected from the award. We admit that an alternative award is valid, if entirely good; but if either branch of the alternative be bad, the whole is

[a] *Dig. l. 4. t. 8. s. 21. n. 8.*

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void.[a] The award here does not entitle the administratrix to a disclosure on oath. If the plaintiffs adopted the alternative of delivering up the securities, they were not to perform the other, that is, to take the oath. The acts were not conjunctive, but disjunctive; and one part being void, the whole is void. The same argument applies to other parts of the award. There is an intimate connexion between those which are certain, (if there are any such,) and those which are uncertain. The whole is, therefore, void.

Mr. *Hopkinson*, in reply, argued, that all the objections to the award in this case were merely technical. It was not attempted to impeach it upon the ground of partiality or misconduct in the arbitrators; nor could it be denied, that the debt liquidated by it was justly due to the plaintiffs. As to the objection that administrators and executors have no power to submit to arbitration the title to lands, it does not appear by the submission bond that the title to any lands was in dispute, or was submitted. No question as to lands ever came before the arbitrators. And if the arbitrators had awarded as to lands, it might be rejected as surplusage. The alternatives of reconveying or releasing, as the case might require, the lands pledged, would be determined in each particular case, by the fact, whether the conveyance was absolute on its face or conditional. If the former, then it was to be reconveyed; if the latter, it

[a] 2 *Saund.* 292. Sergeant Williams' Note.

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was to be released. But it is said, that the arbitrators ought to have distinguished the character in which J. Dennison was indebted. This was unnecessary, as she had assumed the whole liability upon herself in her individual capacity. In the bond she has bound herself personally to perform the award, and she has mixed her individual accounts with those of the estate. *Non constat*, that any part of the debt is due from the estate. The award to reconvey all lands, and to return all bonds, &c. pledged as collateral security, is good; because the arbitrators could not tell what lands were conveyed as collateral security, nor what bonds, &c. were pledged for the same purpose. Both were within the knowledge of the parties, and neither were within the knowledge of the arbitrators. It is denied that if one part of the alternative, as to the securities, is void, the other is so. We do not contend that the arbitrators have decided what was not submitted to them; but we say it was not submitted to them to determine what conveyances were made as pledges, and what were absolute on the face of them. The award is good unless the arbitrators were bound to give a list of the conveyances and security. This they could not do, because they had no means of ascertaining them specifically. But they ascertain them sufficiently by classification, which it is in the power of the parties to apply to each individual case.

March 15th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court. The questions submitted to the

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Court on the statement of facts made by the parties were, 1st. "Whether the said letters so offered by the defendants, or any of them, are competent and sufficient evidence to prove what matters of dispute or controversy were submitted to the said arbitrators under the said bond?"

2d. "Whether the said award in the terms aforesaid, or taken in connexion with the evidence so offered by the defendant, (if such evidence be decided by the Court to be competent and admissible,) is valid, and sufficient in law?"

The letters offered by the defendant were competent evidence to prove that a dispute existed respecting the lands mentioned in the letters, which dispute was brought before the arbitrators.

The matter contained in the letters was pleaded by the defendant in his rejoinder, as being part of the subject in controversy, and is, consequently, confessed by the demurrer. Had the demurrer been argued, therefore, the first question could not have arisen. But as a statement of facts has been substituted for the demurrer, we presume, the question respecting the admissibility of the evidence offered by the defendant is to be considered as if issue had been joined on the fact stated in the rejoinder. So considering it, there is, we think, no doubt of the admissibility of the testimony, nor of its competency, taken in connexion with the award itself, to prove, that a dispute existed respecting the lands mentioned in those letters, which was brought before the arbitrators.

Defect in the award in omitting to state whether the sum due from J. D. was due in her own right, or in her representative character.

We proceed to the second question, which respects the validity of the award.

The first exception taken to this award is, that it omits to state, whether the sum due from Jerusha Dennison, was due from her in her own right, or as

administratrix of Gideon Dennison. The claims upon her in both characters, are submitted to the referees; and they ought to have decided upon all, and to have distinguished between those which she was required to pay in her representative character, and those for which she was bound personally. Had this case been depending in Chancery, where alone the two claims could have been united in one suit, the Chancellor would unquestionably have discriminated between them; and would, in his decree, have ascertained in what character the whole sum was to be paid, or how much was to be paid in each. If this award was made against Mrs. Dennison as administratrix, she would not only be deprived by its form, of the right to plead a full administration, (a defence which might have been made before the arbitrators, and on which their award does not show certainly, that they have decided,) but also of the right to use it in the settlement of her accounts as conclusive evidence, that the money was paid in her representative character. If this objection to the award is to be overruled, it must be on the supposition, that it is made against her personally; yet the statement of facts shows the claim against her to be in her representative character. There is certainly a want of precision in this part of the award, which exposes it to solid objection, and might subject Mrs. Dennison to serious inconvenience.

Second defect in the award.

The second exception to which the Court will advert, affects still more deeply the merits of the award, as well as its justice.

It is apparent from the pleadings in the cause,

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from the facts stated, and from the award itself, that titles to land were deposited by Gideon Dennison, in his life time, with the plaintiffs, as collateral security for the debt claimed by them; and that the conveyances purported to be absolute. Not only was there uncertainty as to the right of redemption; but it was, so far as the Court can discover, absolutely uncertain what lands had been so conveyed.

This subject appears to have been brought before the arbitrators, and they have awarded upon it. Is their award sufficiently certain to give Jerusha Dennison the benefit they intended her? They have awarded "that the said Joshua B. Bond and James Lyle, shall reconvey or release as the case may require, all lands heretofore conveyed or pledged to them, by the late Gideon Dennison, as a collateral security." The award does not determine what lands were so conveyed. If the arbitrators had directed that all the lands conveyed or pledged by Gideon Dennison should be reconveyed, there would have been some difficulty in ascertaining what lands had been conveyed or pledged, from the uncertainty where deeds might have been recorded, and whether grants might not have been deposited without a conveyance; but they have directed that those lands only shall be reconveyed, which had been conveyed or pledged as collateral security. No one of these deeds exhibited on its face any mark of its being made as a collateral security. The question, whether a conveyance was absolute, or as a security only, was a material question, which ought to have been decided by the arbitrators. They have not de-

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cided it, but have left it open to be decided by the parties themselves, or by some other tribunal. This is a very important part of the award, and with respect to this subject, it is incomplete. It is obviously as uncertain now, as it was before the award was made, what lands had been conveyed or pledged to Gideon Dennison as collateral security. This part of the award then is void, and the question is, whether that part which directs the payment of money be void also?

That part of the award which is void for uncertainty, being so connected with the rest as to affect the justice of the case between the parties, the whole is void

That an award may be void in part, and good for the residue, will be readily admitted; but if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.[a] There is great good sense in this distinction. If A. be directed to pay B. $100, and also to do some other act not well enough defined to be obligatory, there is no reason why B. should not have his $100, because he cannot also get that other thing which was intended for him. But if A. be directed to pay B. $100, and B. to do something for the benefit of A., which is not so defined as to enable A. to obtain it, there is much reason why A. should not pay the $100; since he cannot obtain that which the arbitrators as much intended he should receive, as that he should pay the sum awarded against him.

The cause in 2 *Saunders*, 292, is in point. In that case the arbitrators awarded, that William Pope

[a] *Kyd*, 246,

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should be satisfied and paid by John Brett, the money due and payable to the said William Pope, as well for task work as for day work, and then the said William should pay to the said John the sum of £25 lawful money of England. Mutual releases were also awarded.

It was admitted that so much of the award as directed payment to be made for task work and day work, was void for uncertainty, inasmuch as the arbitrator had not ascertained how much was to be paid on those accounts; but it was contended that the award was good for the residue, inasmuch as enough remained to make it mutual. But the Court said, " that if the clause of task work and day work be void, as it is admitted to be, the whole award is void, for it appears that William Pope was awarded to pay the £25, and to give a general release, upon a supposition by the arbitrator, that he should be paid the task work and day work by virtue of that award; and that not being so, it was not the intention of the arbitrators, as appears by the award itself, that he should pay the money, and give a general release, and yet receive nothing for the task work and day work, as by reason of the uncertainty of the award in that part he could not."

The application of this case to that under consideration is complete. The award to reconvey all lands heretofore conveyed or pledged to the plaintiffs by Gideon Dennison, in his life time, as collateral security, is as uncertain as the award to pay for task work and day work already performed; it was as much

the intention of the arbitrators that the parts of their award which were favourable to the different parties should be dependent on each other in this case, as in the case of Pope v. Brett. The arbitrators never could have designed that Bond and Lyle should get their money, and retain their deposits.

In his note upon this case, Sergeant Williams says, "If by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration, for that which he is to do to the other, the award is void in the whole."

This just principle must always remain a part of the law of awards.

The objection to the part of the award which has been considered, applies equally to that part of it which respects bonds, notes, bills, or other securities.

Judgment affirmed.

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U. States
v.
Holmes.

(Law of Nations. Constitutional Law.)

5 wh. 412
140, 420
5 wh. 412
170 406

The United States v. Holmes *et al.*

The Courts of the United States have jurisdiction under the act of the 30th of April, 1790, c. 36. of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States, as if she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

In the same case, and under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, the offence is equally cognizable by the Courts of the United States.

It makes no difference in such a case, and under the same act, whether the offence was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea though he was not thrown overboard.

The prisoners were indicted at the Circuit Court of Massachusetts, at the October term of said Court, 1818, for that the prisoners being citizens of the United States, on the fourth day of July then last past, with force and arms, upon the high seas, out of the jurisdiction of any particular State, in and on board a certain schooner or vessel, the name whereof being to the jurors unknown, in and upon a person known, and commonly called by the name of Reed, a mariner, in and on board said vessel, in the peace of God, and of the said United States, then and there being, piratically, &c., did make an assault; and that they, the said William Holmes, Thomas Warrington,

otherwise called Warren Fawcett, and Edward Rosewain, with a certain steel dagger, &c. which he, the said William Holmes, in his right hand, then and there had and held, the said person commonly called Reed, in and upon the arms and breast of him, the said Reed, upon the high seas, and on board the vessel aforesaid, and out of the jurisdiction of any particular State, piratically, &c. did strike and thrust, giving to the said person commonly called Reed, in and upon the arms and breast of him, the said Reed, upon the high seas, in and on board the vessel aforesaid, and out of the jurisdiction of any particular State, piratically, &c. in and upon the said arms and breast of him, the said Reed, several grievous wounds, and did then and there in and on board the vessel aforesaid, upon the high seas, and out of the jurisdiction of any particular State, piratically, &c. him, the said person commonly called Reed, cast and threw from out of said vessel into the sea, and plunge, sink, and drown him, in the sea aforesaid, of which said grievous wounds, casting, throwing, plunging, sinking, and drowning, the said person commonly called Reed, upon the high seas aforesaid, out of the jurisdiction of any particular State, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said William Holmes, &c. him, the said person commonly called Reed, then and there, upon the high seas as aforesaid, and out of the jurisdiction of any particular State, piratically, &c. did kill and murder, against the peace and dignity of the said United States, and against the form of the

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statute of the said United States, in such case made and provided, &c. Upon which indictment the prisoners were found guilty of the offence charged therein. And, thereupon, the counsel for the prisoners moved the Court for a new trial for the misdirection of the Court upon the points of law which had been raised at the trial. And upon arguing the said motion for a new trial, the several questions occurred before the Circuit Court, which are stated in the opinion of this Court, upon which the opinions of the judges of the Circuit Court were opposed.

From the evidence it appeared that a vessel, apparently Spanish, (whose national character, however, was not distinctly proved by any documentary evidence, or by the testimony of any person conusant of its character,) was captured by two privateers from Buenos Ayres, a prize crew put on board, and the prisoners were of that prize crew. One of the prisoners was a citizen of the United States, and the other prisoners were foreigners. The crime was committed by the prisoners on the person whose death was charged in the indictment, by drowning him on the high seas, he being, at the time, a prize master of the captured vessel, and thrown or driven overboard by the prisoners. There was no proof who were the owners of the privateers, nor where they resided, nor what were the ships' papers or documents, nor where, nor at what time, they were armed or equipped for war. The privateers had been at Buenos Ayres, and openly kept a rendezvous there, and shipped the crews there. The crews consisted chiefly of Englishmen, Frenchmen, and Ame-

ricans. The commander of one of the privateers was, by birth, a citizen of the United States, and had a family domiciled at Baltimore. The commander of the other was by birth an Englishman, but had long been domiciled at Baltimore. There was no proof that either of them had ever lived at Buenos Ayres, or been naturalized there. All the witnesses agreed that both the privateers were built at Baltimore. They had been at Buenos Ayres, before their sailing on this cruise, but a short time, one about six weeks, the other a few days only.

And the said Judges being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of the district attorney for the United States, stated, under the direction of the Judges, and ordered by the Court to be certified under the seal of the Court to this Court, to be finally decided.

Feb. 14*th.*

This case was argued by the *Attorney General* for the United States, and by Mr. *Webster* for the prisoners, upon the same grounds which are stated in the argument of the preceding cases of the United States v. Klintock,[a] the United States v. Smith,[b] and the United States v. Furlong *et al.*[c]

March 15*th.*

Mr. Justice WASHINGTON delivered the opinion of the Court. This case comes before the Court upon a division of opinion of the Judges of the Circuit Court for the district of Massachusetts. The defendants are indicted for murder committed on the

a *Ante*, p. 144. b *Ante*, p. 153. c *Ante*, p. 184.

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high seas; and the questions adjourned to this Court are,

1. Whether the Circuit Court had jurisdiction of the offence charged in the indictment, unless the vessel on board of which the offence was committed, was, at the time, owned by a citizen, or citizens of the United States, and was lawfully sailing under its flag.

2. Whether the Court had jurisdiction of the offence charged in the indictment, if the vessel on board of which it was committed, at the time of the commission thereof, had no real national character, but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatever.

3. Whether it made any difference as to the point of jurisdiction, whether the prisoners, or any of them, were citizens of the United States, or that the offence was consummated, not on board of any vessel, but *in* the high seas.

4. Whether the burthen of proof of the national character of the vessel on board of which the offence was committed, was on the United States, or, under the circumstances stated in the charge of the Court, was on the prisoner.

The two first questions have been decided by this Court at its present session. In Klintock's case,[a] it was laid down, that to exclude the jurisdiction of the Courts of the United States, in cases of murder or robbery committed on the high seas, the vessel in which the offender is, or to which he belongs, must

[a] *Ante*, p. 144.

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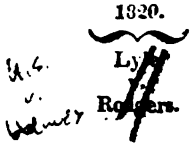
be, at the time, in fact, as well as in right, the property of a subject of a foreign State, and in virtue of such property, subject, at that time, to his control. But if the offence be committed in a vessel, not at the time belonging to subjects of a foreign State, but in possession of persons acknowledging obedience to no government or flag, and acting in defiance of all law, it is embraced by the act of the 30th of April, 1790. It follows, therefore, that murder or robbery committed on the high seas, may be an offence cognizable by the Courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, as if she had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

The third question contains two propositions, 1. As to the national character of the offender, and of the person against whom it is committed; and, 2. As to the place where the offence is committed.

In respect to the first, the Court is of opinion, and so it has been decided during the present term, that it makes no difference whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed either by a citizen or a foreigner, on board of a piratical vessel, the offence is equally cognizable by the Courts of the United

1820.



States, under the above mentioned law. 2. Upon this point, the Court is of opinion, that it makes no difference whether the offence was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard. The words of the above act of Congress are general, and speak of certain offences committed upon the high seas, without reference to any vessel whatsoever on which they should be committed; and no reason is perceived why a more restricted meaning should be given to the expressions of the law, than they literally import. In the case of Furlong, for the murder of Sunley, decided during the present term of the Court, it was certified, that murder committed from on board an American vessel, by a mariner sailing on board an American vessel, by a foreigner on a foreigner, in a foreign vessel, is within the act of the 30th of April, 1790.[a] It follows from this, and the principles laid down in Klintock's case, that the same offence committed by any person *from on board* a vessel having no national character, as by throwing a person overboard, and drowning him, is within the same law.

It is stated, in the charge of the Court below, that it did not appear by any legal proof, that the privateers had commissions from Buenos Ayres, or any ship's papers or documents from that government, or that they were ever recognized as ships of that nation, or of its subjects; or who were the owners, where they resided, or when or where the privateers were armed or equipped. But it did appear

[a] *Ante*, p. 184.

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Lyle v. Rodgers.

in proof, that the captains and crew were chiefly Englishmen, Frenchmen, and American citizens; that the captains were both domiciled at Baltimore, where the family of one of them resided, and that he was by birth an American citizen. It was also proved, that the privateers were Baltimore built.

Under these circumstances, the Court is of opinion, that the burthen of proof of the national character of the vessel on board of which the offence was committed, was on the prisoners.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the district of Massachusetts, and on the questions on which the Judges of that Court were divided in opinion, and was argued by counsel. On consideration whereof, this Court is of opinion:

1. That the said Circuit Court had jurisdiction of the offence charged in the indictment, although the vessel on board of which the offence was committed was not, at the time, owned by a citizen, or citizens of the United States, and was not lawfully sailing under its flag.

2. The said Circuit Court had jurisdiction of the offence charged in the indictment, if the vessel, on board of which it was committed, had, at the time of the commission thereof, no real national character but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatsoever.

3. That it made no difference, as to the point of jurisdiction, whether the prisoners, or any of them,

1820. Owings v. Speed.

were citizens of the United States, or whether the deceased was a citizen of the United States, or that the offence was committed not on board any vessel, but on the high seas.

4. That the burthen of proof of the national character of the vessel, on board of which the offence was committed, was, under the circumstances stated in the charge of the Court, on the prisoners.[a]

(CONSTITUTIONAL LAW.)

OWINGS v. SPEED *et al.*

5 wh 420
1 pet 581

The present Constitution of the United States did not commence its operation until the first Wednesday in March, 1789, and the provision in the Constitution, that "no State shall make any law impairing the obligation of contracts," does not extend to a State law enacted before that day, and operating upon rights of property vested before that time.

The books of a corporation, established for public purposes, are evidence of its acts and proceedings.

March 13th. THIS cause was argued by Mr. *B. Hardin*, for the defendants, no counsel appearing for the plaintiff.

March 16th. Mr. Chief Justice MARSHALL delivered the opinion of the Court. This was an ejectment brought by the plaintiff in the Circuit Court of the United States, for the District of Kentucky, to recover a lot of ground lying in Bardstown.

[a] *Vide* APPENDIX, *Note* IV.

This town was laid off in 1780, on a tract of land consisting of 1000 acres, for which, in 1785, a patent was issued by the Commonwealth of Virginia to Bard and Owings. In 1788, the legislature of Virginia passed an act, vesting 100 acres, part of this tract, in trustees, to be laid off in lots, some of them to be given to settlers, and others to be sold for the benefit of the proprietors. The cause depends, mainly, on the validity of this act. It is contended to be a violation of that part of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

Much reason is furnished by the record for presuming the consent of the proprietors to this law; but the Circuit Court has decided the question independently of this consent, and that decision is now to be reviewed.

Before we determine on the construction of the Constitution in relation to a question of this description, it is necessary to inquire whether the provisions of that instrument apply to any acts of the State legislatures which were of the date with that which it is now proposed to consider.

This act was passed in the session of 1788. Did the Constitution of the United States then operate upon it?

In September, 1787, after completing the great work in which they had been engaged, the Convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to Conventions of the several States, to be convened by their respective legislatures;

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and expressed the opinion, that as soon as it should be ratified by the Conventions of nine States, Congress should fix a day on which electors should be appointed by the States, a day on which the electors should assemble to vote for President and Vice President, "and the time and place for commencing proceedings under this Constitution."

The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, "for commencing proceedings under the Constitution."

Both Governments could not be understood to exist at the same time. The new Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognised by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved on the first of November, by the successive disappearance of its members. It existed potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble.

The resolution of the Convention might originally

have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March, 1789, before which time Virginia had passed the act which is alleged to violate the Constitution.

In the trial of the cause, the defendant produced a witness to prove that the lot for which the suit was instituted, was a part of the 100 acres vested in trustees by the act of assembly. To this testimony the plaintiff objected, because the witness stated, that he had sold a lot in Bardstown, with warranty, and was in possession of another. He added, that no suit had been brought for the said lot, and that he was not interested in this suit. The Court admitted the witness, and to this opinion also a bill of exceptions was taken.

It is so apparent that the witness had no interest in the suit in which he was examined, and it is so well settled that only an interest in that suit could affect his competency, as to make it unnecessary to say more, than that the Court committed no error in permitting his testimony to go to the jury.

There was also an exception taken to the opinion of the Court in allowing the book of the board of trustees, in which their proceedings were recorded, and other records belonging to the corporation, to be given in evidence.

The book was proved by the present clerk, who also proved the handwriting of the first clerk, and of

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the President, who were dead. The Trustees were established by the legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved. There was no error in the opinion admitting them.

There is the less necessity *in this case* for entering more fully into this question, because the record contains other evidence of the facts, which the testimony, to which exceptions were taken, was adduced to prove.

Judgment affirmed, with costs.

5 wh 424
45 f 282
5 wh 424
79 f 134

5 wh 424
5 L-ed 125
114 f 342

5 wh 424
5 L-ed 125
e117 f 335

(CHANCERY.)

CONN *et al.* v. PENN.

In appeals to this court, from the Circuit Courts, in Chancery cases, the parol testimony which is heard at the trial, in the Court below, ought to appear in the record.

A final decree in equity, or an interlocutory decree, which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the Court.

March 14th. This cause was argued by Mr. *Pinkney*, and Mr. *Jones*, for the appellants, and by the *Attorney-General*, and Mr. *Sergeant*, for the respondent.

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Conn v. Penn.

March 16th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court. This is an appeal from a decree of the Circuit Court for the district of Pennsylvania, dismissing the bill of the plaintiffs.

Without going into the merits of the case, the counsel for the plaintiffs contend, that the decree ought to be reversed, because it appears to have been pronounced in part on parol testimony, which has not been introduced into the record, and because the decree was made when the parties interested were not all before the Court.

The laws of the United States have always proceeded on the supposition, that in revising decrees in Chancery, the facts, as well as the law, should be laid before this Court. The judiciary act, which directs that the mode of proof shall be by oral testimony, and that witnesses shall be examined, in open Court, also directs that a statement of facts shall be placed on the record. The act of 1802 leaves it to the discretion of the Courts in those States where testimony in Chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions.

The act of 1803 repeals those parts of the judiciary act which authorize a writ of error, and a statement of facts in Chancery cases; allows an appeal from the decrees of a Circuit Court sitting in Chancery; and directs that a copy of the bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to this Court, and that no new evidence shall be heard.

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Previous to this act, the facts were brought before this Court by the statement of the judge. The depositions are substituted for that statement; and it would seem, since this Court must judge of the fact, as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court. Yet the section which directs that witnesses shall be examined in open Court, is not, in terms, repealed.

The Court has felt considerable doubts on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion, should, in cases within the jurisdiction of this Court, appear in the record. The parties may certainly waive testimony by consent, but if this consent does not appear, it cannot be presumed; and where it is shown on the record that witnesses were examined in open Court, this Court cannot say how much the opinion of the Circuit Court was influenced, and ought to have been influenced, by their testimony.

In this case an interlocutory decree was rendered, which decided, to a great extent, the merits of the cause, at a time when one of the defendants named in the bill was not before the Court, and when it appeared that a person not made a defendant was deeply concerned in interest. This decree granted relief on certain conditions, to certain classes of the plaintiffs, and directed them to appear before commissioners, and to exhibit their proof that they came within the descriptions of persons who were entitled to relief. They refused to appear before these commis-

sioners; and upon the coming in of the report, stating this fact, their bill was dismissed with costs.

The object of this bill was to obtain conveyances from John and William Penn of certain lands which they were supposed to hold as tenants in common, and to which the plaintiffs asserted an equitable title. It was irregular to make the decree which was made respecting the title, until both the defendants were before the Court. But it is the fault of the plaintiffs that they were not. The bill prays conveyances of the legal title on the payment of so much money as was still due on certain principles on which they allege their equitable title to have been acquired. It was referred to commissioners to ascertain the amount of these sums, as well as to class the respective claimants according to the interlocutory decree. They refuse to appear before the commissioners, and to exhibit either their equitable titles, or to show the payments they have made. On what pretence can such plaintiffs claim the aid of a Court of Equity? What is a Court to do in such a state of things? Where a party asking its aid refuses to comply with the conditions on which that aid must depend, a Court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case, we think it would be harsh to make the decree of dismission a bar to a future action. It is not certain that this decree is on such a hearing as to be a bar to a future action; and this point is not positively decided. It is unnecessary to decide it, because we think the interlocutory decree was irregular, and ought not to have been made until William Penn, a tenant in common

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with John Penn, was before the court. The defendants are left at liberty to proceed with their legal title, and this must be sufficient to prevent the plaintiffs from practising unnecessary delays.

For the irregularities which have been stated, we think the decree ought to be reversed, and the cause remanded, that the proper proceedings may be had therein.

DECREE. This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, this Court is of opinion, that the parol testimony stated by the Circuit Court, in the interlocutory decree, to have been heard at the trial, ought to have appeared in the record, and that the interlocutory decree ought not to have been pronounced until William Penn was before the Court by his answer, or otherwise. This Court is, therefore, of opinion, that the decree of the Circuit Court for the district of Pennsylvania, dismissing the bill of the plaintiffs, ought to be reversed, and the same is hereby reversed, and the cause is remanded, that farther proceedings may be had therein, according to equity. All which is ORDERED and DECREED accordingly.

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Campbell v. Pratt.

(CHANCERY.)

CAMPBELL v. PRATT *et al.*

Explanation of the former decree of this Court in the same case, 9 *Cranch*, 500.

THIS cause was argued by Mr. *Key*, for the appellant, and by Mr. *Jones*, for the respondents. *March 13th.*

Mr. Justice JOHNSON delivered the opinion of the Court. The principal question in this case is, whether the Circuit Court has executed the decrees formerly pronounced between these parties,[a] according to their true intent and meaning. Some obscurity has been thrown over the meaning of those decrees, from an obvious error in copying them into the minutes. The primary object of this Court was, to give to Law the benefit of a foreclosure in all the lots included in the mortgage from Morris, Nicholson and Greenleaf, in whose right, Pratt, Francis and Company founded their claim. But being called upon by the equity of intervening interests, (in creating which Law himself had had some agency,) they decreed a distribution of the whole amount due to Law, between that class of lots, still held by the mortgagor, and that which had passed into the hands *March 16th.*

a S. C. 9 *Cranch*, 500.

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of the present appellants. This class was again subject to another discrimination, inasmuch as thirteen of the thirty-two purchased by the appellant, were subject to a second mortgage, executed by Morris, Nicholson, and Greenleaf, to one Duncanson, and the equitable interest in which was adjudged to the assignee of Greenleaf. The sum which thirty-two lots were decreed to contribute to the payment of Law, was to be determined by the ratio which these lots bore to the whole of the mortgaged premises.

It is now contended, that another distribution of the sum thus charged, is to be made between the lots thus mortgaged to Duncanson, and the remaining lots of this class. And it is ascertained, that the consequence will be, putting a considerable sum in the pocket of this appellant, to the prejudice of Duncanson's mortgage, as the sale of those thirteen lots falls considerably short of satisfying the sum decreed on that mortgage. That is, that these thirteen lots shall be charged rateably with the sum charged upon the whole class, so as to contribute to relieve the remaining lots, and by thus contributing to the satisfaction of Law's mortgage, leave the larger sum from the sale of the remaining lots to be paid over to this appellant. This, it is contended, is both conformable to the decree, and to general principles.

If conformable to the decree, it is in vain to refer to general principles. But, we think, the purport of the decree is obviously otherwise. Campbell, claim-

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ing as purchaser at sheriffs' sales, under an attachment of the interest of the mortgagors, filed his bill for a redemption of the whole of this class of lots, and the Court decreed, that he be permitted to redeem, on payment, first, of the ratio of Law's mortgage, charged on this class, secondly, on payment of two thirds of the amount of principal and interest of the debt due to Duncanson. And as the opposite claimants had filed their bill for a foreclosure, a sale is ordered of the whole of this class of lots to raise the money, to be applied in the same manner, if Campbell should fail in six months to redeem. The application of the amount of sales must then be regulated by the right of redemption as decreed to Campbell; and that is, that he pay, first, the contribution to Law, secondly, the amount due to Duncanson, upon which conditions only he could hold the lots discharged of the mortgages, and, consequently, after those payments only, could he receive the balance of the money, the representative of his remaining interest in the land.

And this exposition of the decree is perfectly consonant with general principles. All the doubt in the case has been raised by the effort to exhibit this appellant as the holder of an independent interest, that is, as a third incumbrancer. But this is by no means his relative character. He is nothing more than the legal representative of the interests of Morris, Nicholson, and Greenleaf, in the lots attached, and sold to him. The attachment was levied upon the equity of redemption existing in those mortga-

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gors; and the decision of this Court, in supporting his right, was placed upon the decision of the Courts of Maryland, (in which the land then lay,) which maintained the validity of an attachment levied upon an equity of redemption. He was, then, nothing more than the assignee of an equity of redemption, and could claim no greater equity as against either Duncanson or Law. That he was not to be considered as a subsequent incumbrancer, is conclusively determined by this consideration, that there would then have been no equity of redemption outstanding in any one. In the relation of the assignee of an equity of redemption, he appeared first in this Court, and it is obvious from the former decree, that in that light only did this Court view him. In this light, he could lay claim to no rights inconsistent with those of the creditor; and, as far as the proceeds of the 13 lots were adequate to satisfying Duncanson, he could be entitled to nothing until that debt was paid. Any other application of the proceeds of those lots would be preferring the mortgagor to the mortgagee, or the debtor to the creditor; and confer on the assignee of the equity of redemption, a greater equity against the mortgagee than could have been decreed to the original mortgagor.

That part of the decision of the Circuit Court, will, therefore, be affirmed. But of the remaining two points, it will be necessary to refer the subject, in order to have the statements and evidence in this record compared, upon which a conclusion must be formed. If this appellant has been charged with a greater amount than his just ratio of the debt due to

Law, he is entitled to relief. But the principles being established, this becomes a mere matter of numerical calculation. 1820. The Atalanta.

Decree accordingly.

(PRIZE.)

The ATALANTA.—*Faussat*, Claimant.

A question of proprietary interest on farther proof. Condemnation pronounced.

This cause was continued at February term, 1818,[a] for farther proof, but the farther proof received at the last term being unsatisfactory, it was again continued, on account of some peculiar circumstances in the case, to the present term, when no farther proof being produced, condemnation was pronounced.

Decree reversed.

[a] *Vide Ante, Vol.* III. p. 409.

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U. States
v.
Lancaster.

(PRACTICE.)

5 wall. 434
431 890
5 wall. 462
148 397

The UNITED STATES v. LANCASTER.

The District Judge cannot sit in the Circuit Court in a cause brought by writ of error from the District to the Circuit Court, and the cause cannot in such a case be brought from the Circuit to this Court upon a certificate of a division of opinion of the judges.

ERROR to the Circuit Court of Pennsylvania.

This was an action of debt originally brought in the District Court, and carried by writ of error to the Circuit Court, from which it was brought to this Court, upon a case agreed by the parties, and a certificate that the opinions of the judges were opposed upon a question arising in the cause.

March 10th. The cause was argued by Mr. *C. J. Ingersoll*, for the plaintiffs, and by Mr. *Sergeant*, for the defendant.

March 17th: Mr. Chief Justice MARSHALL delivered the opinion of the Court, that it had no jurisdiction of the cause, as the District Judge could not sit in the Circuit Court on a writ of error from his own decision, and consequently there could be no division of opinion to be certified to this Court.[a]

a Neither can a cause be brought to this Court by writ of error, which has been carried from the District to the Circuit Court by writ of error. The United States v. Barker, *Ante*, *Vol.* II. p. 395.

1820.

U. States v. Lancaster.

JUDGMENT. This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Pennsylvania, and was argued by counsel. On consideration whereof, it was ADJUDGED and ORDERED, that the said cause be remanded to the said Circuit Court, it not appearing from the said transcript that this Court has jurisdiction in said cause.

APPENDIX.

APPENDIX.

NOTE I.

Speech of the honourable JOHN MARSHALL, *delivered in the house of representatives of the United States, on the resolutions of the honourable Edward Livingston, relative to Thomas Nash, alias Jonathan Robins.*

App. 5wh 2 149 714

Mr. MARSHALL said, believing as he did most seriously, that in a government constituted like that of the United States, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood: on rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it: he could not but have been highly gratified with the very eloquent, and what was still more valuable, the very able, and very correct argument, which had been delivered by the gentleman from Delaware (Mr. Bayard) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal, but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject; but as the argument in opposition to the resolutions had been assailed, with considerable ability, by gentlemen of great talents, he trusted the house would not think the time misapplied, which would be devoted to the re-establishment of the principles contained in that argument, and to the refutation of those advanced in opposition to it. In endeavouring to do this, he should notice the ob-

servations in support of the resolutions, not in the precise order in which they were made, but as they applied to the different points he deemed it necessary to maintain, in order to demonstrate, that the conduct of the executive of the United States could not justly be charged with the errors imputed to it by the resolutions.

His first proposition, he said, was, that the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty of amity, commerce, and navigation, entered into between the United States of America and Great Britain.

He read the article, and then observed: The *casus fœderis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

The case stated is, that Thomas Nash, having committed a murder on board a British frigate, navigating the high seas under a commission from his Britannic majesty, had sought an asylum within the United States, and on this case his delivery was demanded by the minister of the king of Great Britain.

It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation.

That such a murder is within their jurisdiction, has been fully shown by the gentleman from Delaware. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported every where by public opinion, and is recognized by writers on the law of nations. Rutherforth, in his second volume, (p. 180.) says, "The jurisdiction which a civil society has

"over the persons of its members, affects them immediately, "whether they are within its territories or not."

This general principle is especially true, and is particularly recognized, with respect to the fleets of a nation on the high seas. To punish offences committed in its fleet, is the practice of every nation in the universe; and consequently the opinion of the world is, that a fleet at sea is within the jurisdiction of the nation to which it belongs. Rutherforth (vol. ii. p. 491.) says, "There can be no doubt about the jurisdiction of a nation over "the persons which compose its fleets, when they are out at "sea, whether they are sailing upon it, or are stationed in any "particular part of it."

The gentleman from Pennsylvania, (Mr. Gallatin,) though he has not directly controverted this doctrine, has sought to weaken it, by observing, that the jurisdiction of a nation at sea could not be complete even in its own vessels; and in support of this position, he urged the admitted practice of submitting to search for contraband; a practice not tolerated on land, within the territory of a neutral power. The rule is as stated; but is founded on a principle which does not affect the jurisdiction of a nation over its citizens or subjects in its ships. The principle is, that in the sea itself, no nation has any jurisdiction. All may equally exercise their rights, and consequently the right of a belligerent power to prevent aid being given to his enemy, is not restrained by any superior right of a neutral in the place. But if this argument possessed any force, it would not apply to national ships of war, since the usage of nations does not permit them to be searched.

According to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation.

Although such a murder is plainly within the letter of the article, it has been contended not to be within its just construction; because, at sea, all nations have a common jurisdiction, and the article correctly construed, will not embrace a case of concurrent jurisdiction.

It is deemed unnecessary to controvert this construction, be-

cause the proposition, *that the United States had no jurisdiction over the murder committed by Thomas Nash*, is believed to be completely demonstrable.

It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary, no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself. This principle is laid down in 2 *Ruth.* 488. 491.

The American government has, on a very solemn occasion, avowed the same principle. The first minister of the French republic asserted and exercised powers of so extraordinary a nature, as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such, as necessarily to occasion a very serious and mature consideration of the opinions it should adopt Of consequence, the opinions then declared, deserve great respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens, in order to cruise against nations with whom America was at peace. In reasoning against this extravagant claim, the then secretary of state, in his letter of the 17th of June, 1793, says: "For our citizens then to commit murders "and depredations on the members of nations at peace with us, "or to combine to do it, appeared to the executive and to those "whom they consulted, as much against the laws of the land, "as to murder or rob, or combine to murder or rob, its own "citizens; and as much to require punishment, if done within "their limits, where they have a territorial jurisdiction, or on "the high seas, where they have a *personal jurisdiction*, that is "to say, one which reaches *their own citizens only;* this being "an *appropriate part* of each nation, on an element where all "have a common jurisdiction."

The well considered opinion then of the American government on this subject is, that the jurisdiction of a nation at sea is "*personal*," reaching its "*own citizens only*," and that this is "*the appropriate part* of each nation" on that element.

This is precisely the opinion maintained by the opposers of the resolutions. If the jurisdiction of America at sea be personal, reaching its own citizens only; if this be its appropriate

part, then the jurisdiction of the nation cannot extend to a murder committed by a British sailor, on board a British frigate navigating the high seas, under a commission from his Britannic majesty.

As a further illustration of the principle contended for, suppose a contract made at sea, and a suit instituted for the recovery of money which might be due thereon. By the laws of what nation would the contract be governed? The principle is general, that a personal contract follows the person, but is governed by the law of the place where it is formed. By what law then would such a contract be governed? If all nations had jurisdiction over the place, then the laws of all nations would equally influence the contract; but certainly no man will hesitate to admit, that such a contract ought to be decided according to the laws of that nation, to which the vessel or contracting parties might belong.

Suppose a duel attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws or tribunals of any other nation whatever.

Suppose a private theft by one mariner from another, and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime, and are equally authorized to punish it?

If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet all gentlemen will disclaim this power. It follows, then, that no such common jurisdiction exists.

In truth, the right of every nation to punish is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its

own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruizing on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation.

It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas.

A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable.

It had been observed by his colleague, (Mr. Nicholas,) for the purpose of showing that the distinction taken on this subject by the gentleman from Delaware (Mr. Bayard) was inaccurate, that any vessel robbed on the high seas, could be the property only of a single nation, and being only an offence against that nation, could be, on the principle taken by the opposers of the resolutions, no offence against the law of nations: but in this his colleague had not accurately considered the principle. As a man, who turns out to rob on the highway, and forces from a stranger his purse with a pistol at his bosom, is not the particular enemy of that stranger, but alike the enemy of every man who carries a purse, so those who, without a commission, rob on the high seas, manifest a temper hostile to all nations, and therfore become the enemies of all. The same inducements which occasion the robbery of one vessel, exist to occasion the robbery of others, and therefore the single offence is an offence

against the whole community of nations, manifests a temper hostile to all, is the commencement of an attack on all, and is consequently, of right, punishable by all.

His colleague had also contended, that all the offences at sea, punishable by the British statutes, from which the act of Congress was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among these, consequently murder was an act of piracy by the law of nations, and therefore punishable by every nation. In support of this position, he had cited 1 *Hawk. P. C.* 267. 271. 3 *Inst.* 112. and 1 *Woodeson*, 140.

The amount of these cases is, that no new offence is made piracy by the statutes; but that a different tribunal is created for their trial, which is guided by a different rule from that which governed previous to those statutes. Therefore, on an indictment for piracy, it is still necessary to prove an offence which was piracy before the statutes. He drew from these authorities a very different conclusion from that which had been drawn by his colleague. To show the correctness of his conclusion, it was necessary to observe, that the statute did not indeed change the nature of piracy, since it only transferred the trial of the crime to a different tribunal, where different rules of decision prevailed; but having done this, other crimes committed on the high seas, which were not piracy, were made punishable by the same tribunal; but certainly this municipal regulation could not be considered as proving that those offences were, before, piracy by the law of nations. Mr. Nicholas insisted that the law was not correctly stated; whereupon Mr. Marshall called for 3 *Inst.* and read the statute.

"All treasons, felonies, robberies, murders, and confedera-
"cies, committed in or upon the seas, &c. shall be inquired,
"tried, heard, determined and judged in such shires, &c. in like
"form and condition as if any such offence had been committed
"on the land, &c."

"And such as shall be convicted, &c. shall have and suffer
"such pains of death, &c. as if they had been attainted of any
"treason, felony, robbery, or other the said offences done upon
"the land."

This statute, it is certain, does not change the nature of piracy; but all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, are not declared to have been, nor are they, piracies. If a man be indicted as a pirate, the offence must be shown to have been piracy before the statute; but if he be indicted for treason, felony, robbery, murder, or confederacy committed at sea, whether such offence was or was not a piracy, he shall be punished in like manner as if he had committed the same offence on land. The passage cited from 1 *Woodeson*, 140, is a full authority to this point. Having stated that offences committed at sea were formerly triable before the lord high admiral, according to the course of the Roman civil law, Woodeson says, "but by the statute 27 *H.* 8. c. 4, "and 28 *H.* 8. c. 15. all treasons, felonies, piracies, and other "crimes committed on the sea, or where the admiral has juris-"diction, shall be tried in the realm as if done on land. But "the statutes referred to affect only the manner of the trial *so* "*far as respects piracy*. The nature of the offence is not "changed. Whether a charge amounts to piracy or not, must "still depend on the law of nations, except where, *in the case* "*of British subjects*, express acts of parliament have declared "that the crimes therein specified shall be adjudged piracy, or "shall be liable to the same mode of trial and degree of pun-"ishment."

This passage proves not only that all offences at sea are not piracies by the law of nations, but also that all indictments for piracy must depend on the law of nations, "except where, *in the* "*case of British subjects, express acts of parliament*" have changed the law. Why do not these "express acts of parliament" change the law as to others than "British subjects?" The words are general; "all treasons, felonies," &c. Why are they confined in construction to British subjects? The answer is a plain one. The jurisdiction of the nation is confined to its territory and to its subjects.

The gentleman from Pennsylvania (Mr. Gallatin) abandons, and very properly abandons, this untenable ground. He admits that no nation has a right to punish offences against another nation, and that the United States can only punish offences against

their own laws, and the law of nations. He admits too, that if there had only been a mutiny (and consequently if there had only been a murder) on board the *Hermoine*, that the American courts could have taken no cognizance of the crime. Yet mutiny is punishable as piracy by the law of both nations. That gentleman contends that the act committed by Nash was piracy according to the law of nations. He supports his position by insisting, that the offence may be constituted by the commission of a single act; that unauthorized robbery on the high seas is this act, and that the crew having seized the vessel, and being out of the protection of any nation, were pirates.

It is true that the offence may be completed by a single act; but it depends on the nature of that act. If it be such as manifests general hostility against the world—an intention to rob generally, then it is piracy; but if it be merely a mutiny and murder in a vessel, for the purpose of delivering it up to the enemy, it seems to be an offence against a single nation, and not to be piracy. The sole object of the crew might be to go over to the enemy, or to free themselves from the tyranny experienced on board a ship of war, and not to rob generally.

But should it even be true, that running away with the vessel to deliver her up to an enemy was an act of general piracy, punishable by all nations, yet the mutiny and murder was a distinct offence. Had the attempt to seize the vessel failed after the commission of the murder, then, according to the argument of the gentleman from Pennsylvania, the American courts could have taken no cognizance of the crime. Whatever, then, might have been the law respecting the piracy, of the murder there was no jurisdiction. For the murder, not the piracy, Nash was delivered up. Murder, and not piracy, is comprehended in the twenty-seventh article of the treaty between the two nations. Had he been tried then, and acquitted on an indictment for the piracy, he must still have been delivered up for the murder, of which the court could have no jurisdiction. It is certain that an acquittal of the piracy would not have discharged the murder; and, therefore, in the so much relied on trials at Trenton, a separate indictment for murder was filed after an indictment for piracy. Since, then, if acquitted for piracy, he must have been

delivered to the British government on the charge of murder, the president of the United States might, very properly, without prosecuting for the piracy, direct him to be delivered up on the murder.

All the gentlemen who have spoken in support of the resolutions, have contended that the case of Thomas Nash is within the purview of the act of congress, which relates to this subject, and is by that act made punishable in the American courts. That is, that the act of congress designed to punish crimes committed on board a British frigate.

Nothing can be more completely demonstrable than the untruth of this proposition.

It has already been shown, that the legislative jurisdiction of a nation extends only to its own territory, and to its own citizens, wherever they may be. Any general expression in a legislative act must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act. Of consequence, an act of congress can only be construed to apply to the territory of the United States, comprehending every person within it, and to the citizens of the United States.

But independent of this undeniable truth, the act itself affords complete testimony of its intention and extent. (See *Laws of the U. S.* vol. 1. p. 10.)

The title is, "An act for the punishment of certain crimes "against the *United States.*" Not against *Britain*, France, or the world, but singly "against the United States."

The first section relates to treason, and its objects are, "any person or persons owing allegiance to the United States." This description comprehends only the citizens of the United States, and such others as may be on its territory or in its service.

The second section relates to misprision of treason, and declares, without limitation, that any person or persons, having knowledge of any treason, and not communicating the same, shall be guilty of that crime. Here, then, is an instance of that limited description of persons in one section, and of that general description in another, which has been relied on to support the construction contended for by the friends of the resolutions. But will it be pretended that a person can commit misprision of

treason, who cannot commit treason itself? That he would be punishable for concealing a treason, who could not be punished for plotting it? Or can it be supposed that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the United States, and should not cross the Atlantic to reveal them?

The same observations apply to the sixth section, which makes "any person or persons" guilty of misprision of felony, who having knowledge of murder or other offences enumerated in that section, should conceal them. It is impossible to apply this to a foreigner, in a foreign land, or to any person not owing allegiance to the United States.

The eighth section, which is supposed to comprehend the case, after declaring, that if any person or persons shall commit murder on the high seas, he shall be punishable with death; proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate and a felon.

The persons who are the objects of this section of the act are all described in general terms, which might embrace the subjects of all nations. But is it to be supposed, that if, in an engagement between an English and a French ship of war, the crew of the one or the other should lay violent hands on the captain, and force him to strike, that this would be an offence against the act of congress, punishable in the courts of the United States? On this extended construction of the general terms of the section, not only the crew of one of the foreign vessels forcing their captain to surrender to another, would incur the penalties of the act, but if, in the late action between the gallant Truxton and a French frigate, the crew of that frigate had compelled the captain to surrender while he was unwilling to do so, they would have been indictable as felons in the courts of the United States. But surely the act of congress admits of no such extravagant construction.

His colleague, Mr. Marshall said, had cited and particularly relied on the ninth section of the act. That section declares,

that if a citizen shall commit any of the enumerated piracies, or any act of hostility on the high seas against the United States, under colour of a commission from any foreign prince or state, he shall be adjudged a pirate, felon, and robber, and shall suffer death.

This section is only a positive extension of the act to a case which might otherwise have escaped punishment. It takes away the protection of a foreign commission from an American citizen, who on the high seas robs his countrymen. This is no exception from any preceding part of the law, because there is no part which relates to the conduct of vessels commissioned by a foreign power; it only proves that, in the opinion of the legislature, the penalties of the act could not, without this express provision, have been incurred by a citizen holding a foreign commission.

It is then most certain, that the act of congress does not comprehend the case of a murder committed on board a foreign ship of war.

The gentleman from New-York has cited 2 *Woodeson*, 428, to show that the courts of England extend their jurisdiction to piracies committed by the subjects of foreign nations.

This has not been doubted. The case from *Woodeson* is a case of robberies committed on the high seas by a vessel without authority. There are ordinary acts of piracy, which, as has been already stated, being offences against all nations, are punishable by all. The case from 2 *Woodeson*, and the note cited from the same book, by the gentleman from Delaware, are strong authorities against the doctrines contended for by the friends of the resolutions.

It has also been contended, that the question of jurisdiction was decided at Trenton, by receiving indictments against persons there arraigned for the same offence, and by retaining them for trial after the return of the habeas corpus.

Every person in the slightest degree acquainted with judicial proceedings, knows that an indictment is no evidence of jurisdiction; and that in criminal cases, the question of jurisdiction will seldom be made but by arrest of judgment after conviction.

The proceedings after the return of the habeas corpus only prove, that the case was not such a case as to induce the judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from New-York, that the form of the indictment is, itself, evidence of a power in the court to try the case. Every word of that indictment, said the gentleman, gives the lie to a denial of the jurisdiction of the court.

It would be assuming a very extraordinary principle indeed, to say, that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court, should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be to authorize a court to take cognizance of it, some words in the indictments, at Trenton, ought to be noticed. The indictments charge the persons to have been within the peace, and the murder to have been committed against the peace, of the United States. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas are within the peace of the United States, or a murder committed on board such a frigate against the peace of any other than the British government.

It is then demonstrated, that the murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter and the spirit of the twenty-seventh article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder: to have acquitted and discharged him, would have been a breach of faith and a violation of national duty.

But is has been contended, that although Thomas Nash ought to have been delivered up to the British minister, on the requisition made by him in the name of his government, yet the interference of the president was improper.

This, Mr. Marshall said, led to his second proposition, which was,

That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers stated by the gentleman from New-York, and that it was the duty of each department to resist the encroachments of the others.

This being established, the inquiry was, to what department was the power in question allotted?

The gentleman from New-York had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions offered by the gentleman from New-York. By the constitution, the judicial power of the United States is extended to all *cases in law and equity*, arising under the constitution, laws, and treaties of the United States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties, and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from New-York with intentional misrepresentation; he would not attribute to

him such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled, and his judgment betrayed into the opinions those resolutions expressed.

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court: As under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations their property within the United States: or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the United States. But the judicial power cannot extend to political compacts: as, the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our treaty with France; or the case of the delivery of a murderer, under the twenty-seventh article of our present treaty with Britain.

The gentleman from New-York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr Marshall, but not triumphantly, to retort the question—By what authority can any court render such a judgment? What power does a court possess to seize any individual, and determine that he shall be

adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts.

Gentlemen have cited and relied on that clause in the constitution, which enables Congress to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, together with the act of Congress declaring the punishment of those offences, as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it did not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law, therefore, cannot act upon the case. But this clause of the constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States, of course, extends to it. On this principle the courts of admiralty under the confederation took cognizance of piracy, although there was no express power in Congress to define and punish the offence.

But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could, consequently, transfer no other to their courts; and it has already been proved, that a murder committed on board a foreign ship of war is not comprehended within this description.

The consular convention with France has also been relied

on, as proving the act of delivering up an individual to a foreign power, to be in its nature judicial, and not executive.

The ninth article of that convention authorizes the consuls and vice consuls of either nation to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice consuls shall address themselves to the courts, judges, and officers competent."

This article of the convention does not, like the twenty-seventh article of the treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same manner.

It is said that the then president of the United States declared the incompetency of the courts, judges, and officers, to execute this contract, without an act of the legislature. But the then president made no such declaration. He has said that some legislative provision is requisite to carry the stipulations of the convention into full effect. This, however, is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended, that the conduct of the executive on former occasions, similar to this in principle, has been such as to evince an opinion, even in that department, that the case in question is proper for the decision of the courts.

The fact adduced to support this argument, is the determination of the late president on the case of prizes made within the jurisdiction of the United States, or by privateers fitted out in their ports.

The nation was bound to deliver up those prizes, in like manner as the nation is now bound to deliver up an individual demanded under the twenty-seventh article of the treaty with Britain. The duty was the same, and devolved on the same department.

In quoting the decision of the executive on that case, the gentleman from New-York has taken occasion to bestow a high encomium on the late president, and to consider his conduct as furnishing an example worthy the imitation of his successor.

It must be cause of much delight to the real friends of that great man, to those who supported his administration while in office from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it by those who had been supposed to possess different opinions. If the measure now under consideration shall be found, on examination, to be the same in principle with that which has been cited by its opponents as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct too may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the secretary of state, the one of the 29th of June, 1793, to Mr. Genet, and the other of the 16th of August, 1793, to Mr. Morris.

In the letter to Mr. Genet, the secretary says, that the claimant having filed his libel against the ship William in the court of admiralty, there was no power which could take the vessel out of court until it had decided against its own jurisdiction; that having so decided, the complaint is lodged with the executive, and he asks for evidence to enable that department to consider and decide finally on the subject.

It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true, that when an individual claiming the property as his, had asserted that claim in court, the executive acknowledges in itself a want of power to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case, if, instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution,

carried on in the name of the United States, can without impropriety be dismissed at the will of the government. The opinion, therefore, given in this letter is unquestionably correct; but it is certainly misunderstood, when it is considered as being an opinion that the question was not in its nature a question for executive decision.

In the letter to Mr. Morris, the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored, but says it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department.

The principle, then, according to this letter, is not submitted to the courts—whether a vessel captured within a given distance of the American coast was or was not captured within the jurisdiction of the United States, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tribunal shall settle the fact. In this respect a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New-York, permit me now, said Mr. Marshall, to ask the attention of the house to the whole course of executive conduct on this interesting subject.

It is first mentioned, in a letter from the secretary of state to Mr. Genet, of the 25th of June, 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war, (the president being absent,) in which (so well were they assured of the president's way of thinking in those cases) it was determined, that the vessels should be detained in the custody of the consuls in the ports, "until the "government of the United States shall be able to *inquire into*, "*and decide on the fact.*"

In his letter of the 12th of July, 1793, the secretary writes, the president has determined to *refer* the questions concerning prizes "to *persons learned in the laws.*" And he requests that

certain vessels enumerated in the letter should not depart "un- "til *his* ultimate determination shall be made known."

In his letter of the 7th of August, 1793, the secretary informs Mr. Genet, that the president considers the United States as bound "*to effectuate the restoration of*, or to make compensation "for, prizes which shall have been made of any of the parties "at war with France, subsequent to the 5th day of June last, "by privateers fitted out of our ports." That it is consequently expected that Mr. Genet will cause restitution of such prizes to be made. And that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter "brought within their ports by any of the said privateers."

In his letter of the 10th of November, 1793, the secretary informs Mr. Genet, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the governors of the several states were requested, on receiving any such claim, immediately to notify thereof the attorneys of their several districts, whose duty it would be to give notice "to the principal agent of both parties, and also "to the consuls of the nations interested, and to recommend to "them to appoint by mutual consent arbiters to decide whether "the capture was made within the jurisdiction of the United "States, as stated in my letter of the 8th instant, according to "whose award the governor may proceed to deliver the vessel "to the one or the other party." "If either party refuse to "name arbiters, then the attorney is to take depositions on no- "tice, which he is to transmit for the *information and decision* "*of the president.*" "This prompt procedure is the more to "be insisted on, as it will enable the president, *by an immedi-* "*ate delivery* of the vessel and cargo to the party having title, to "prevent the injuries consequent on long delay."

In his letter of the 22d of November, 1793, the secretary repeats, in substance, his letter of the 12th of July and 7th of August, and says, that the determination to deliver up certain vessels, involved the brig Jane of Dublin, the brig Lovely Lass, and the brig Prince William Henry. He concludes with saying, "I have it in charge to inquire of you, sir, whether these "three brigs have been given up according to the *determina-*

" *tion of the president*, and if they have not, to repeat the re-
" quisition that they may be given up to their former owners."

Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision, then, on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which the gentleman from New-York has cited with such merited approbation; and which he has declared to stand on the same principles with those which ought to have governed in the case of Thomas Nash; which deserves the more respect, because the government of the United States was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision, quoted as a precedent, and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same with that which was made in the case under consideration. It is a full authority to show, that, in the opinion always held by the American government, a case like that of Thomas Nash is a case for executive, and not judicial decision.

The clause in the constitution, which declares, that " the trial of " all crimes, except in cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual from the executive to the judicial department.

But certainly this clause in the constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of the people of Europe and Asia, or to direct and control proceedings against criminals throughout the universe. It can then be designed only to guide the proceedings of our own courts, and to prescribe the mode of punishing offences committed against the government of the United States, and to which the jurisdiction of the nation may rightfully extend.

It has already been shown, that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice; the question to be determined was, not how his crime should be tried and punished, but whether he

should be delivered up to a foreign tribunal which was alone capable of trying and punishing him. A provision for the trial of crimes in the courts of the United States, is clearly not a provision for the performance of a national compact for the surrender to a foreign government of an offender against that government.

The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the independence of the nation, before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review and amendment of so unwise a provision. If, then, this clause does not extend to offences committed in the fleets and armies of the United States; how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, or of the Ottoman or Russian empires?

The same argument applies to the observations on the seventh article of the amendments to the constitution. That article relates only to trials in the courts of the United States, and not to the performance of a contract for the delivery of a murder not triable in those courts.

In this part of the argument, the gentleman from New-York has presented a dilemma of a very wonderful structure indeed. He says that the offence of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed: If it was not a crime, he ought not have been delivered up to a foreign government, where his punishment was inevitable.

It had escaped the observation of that gentleman, that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the United States; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma then, the gentleman from New-York is, himself, perfectly at liberty to retain either ~~form~~. He has chosen to consider it as a crime and says it has been

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made a crime by treaty, and is punished by sending the offender out of the country.

The gentleman is incorrect in every part of his statement. Murder on board a British frigate is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gibbeted, evinced to him that the punishment of his crime was of a much more serious nature than mere banishment from the United States.

The gentleman from Pennsylvania and the gentleman from Virginia have both contended, that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided are stated by the gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided: but it by no means follows, that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled by the misrepresentation of the constitution made in the resolutions of the gentleman from New-York; and, in consequence of being so misled, his observations have the appearance of endeavouring to fit the constitution to his arguments, instead of adapting his arguments to the constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the president, he has not advanced a single step toward proving that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by priva-

teers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them, if in its power, were questions of law, but they were questions of political law, proper to be decided, and they were decided by the executive, and not by the courts.

The *casus fœderis* of the guaranty was a question of law, but no man would have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *casus fœderis* under the twenty-seventh article of the treaty with Britain is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the *casus fœderis* of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

When, therefore, the gentleman from Pennsylvania has established, that in delivering up Thomas Nash, points of law were decided by the president, he has established a position which in no degree whatever aids his argument.

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance.

The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode; and Congress may devolve on others the whole execution of the contract: but till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.

The gentleman from Pennsylvania contends that, although this should be properly an executive duty, yet it cannot be performed until Congress shall direct the mode of performance. He says, that although the jurisdiction of the courts is extended by the constitution to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of causes expressly allotted to them by the constitution. The executive, he says, can, no more than courts, supply a legislative omission.

It is not admitted that in the case stated, courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. And although the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration. If, then, there was an act of Congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the United States, should be delivered up by the United States, on the demand of his Britannic majesty, and such evidence of his criminality as would have justified his commitment for trial, had the offence been here committed; could the president, who is bound to execute the laws, have jus-

tified a refusal to deliver up the criminal, by saying that the legislature had totally omitted to provide for the case.

The executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connexion between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the union?

This department too, independent of judicial aid, which may, perhaps, in some instances be called in, is furnished with a great law officer, whose duty it is to understand and to advise when the *casus fœderis* occurs. And if the president should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge by a writ of habeas corpus.

It is then demonstrated, that according to the practice and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question, the power to decide which rests alone with the executive department.

It remains to inquire, whether in exercising this power, and in performing the duty it enjoins, the president has committed

an unauthorized and dangerous interference with judicial decisions.

That Thomas Nash was committed originally at the instance of the British consul at Charleston, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty between the two nations, has been already so ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would, therefore, Mr. Marshall said, consider the case as if Nash, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted.

Gentlemen had considered it as an offence against judicial authority, and a violation of judicial rights, to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject as if it was the privilege of courts to condemn to death the guilty wretch arraigned at their bar, and that to intercept the judgment was to violate the privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect, the president expresses constitutionally the will of the nation, and may rightfully, as was done in the case at Trenton, enter a *nolle prosequi*, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the president directed the judge at Charleston to decide for or against his own jurisdiction, to condemn or acquit the prisoner, this would have been a dangerous interference with judicial decisions, and ought to have been resisted. But no such direction has been given, nor any such decision been required. If the president determined that Thomas Nash ought to have been delivered up to the British govern-

ment for a murder committed on board a British frigate, provided evidence of the fact was adduced, it was a question which duty obliged him to determine, and which he determined rightly. If in consequence of this determination he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of Thomas Nash would not bind as a precedent against the jurisdiction of the court. If it should even prove that in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more: and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it would have no influence with the court in deciding on its jurisdiction.

Taking the fact then even to be as the gentlemen in support of the resolutions would state it, the fact cannot avail them.

It is to be remembered too, that in the case stated to the president, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The president and judge seem to have entertained on this subject the same opinion: and in consequence of the opinion of the judge, the application was made to the president.

It has then been demonstrated:

1st. The case of Thomas Nash, as stated to the president, was completely within the twenty-seventh article of the treaty between the United States of America and Great Britain.

2d. That this question was proper for executive and not for judicial decision; and,

3d. That in deciding it, the president is not chargeable with an interference with judicial decisions.

After trespassing so long, Mr. Marshall said, on the patience of the house, in arguing what had appeared to him to be the

material points growing out of the resolutions, he regretted the necessity of detaining them still longer for the purpose of noticing an observation, which appeared not to be considered by the gentleman who made it as belonging to the argument.

The subject introduced by this observation, however, was so calculated to interest the public feelings, that he must be excused for stating his opinion on it.

The gentleman from Pennsylvania had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. Marshall said, he concurred entirely with that gentleman. He believed the opinion to be unquestionably correct, as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a place in the bosom of any American. He could not pretend, and did not pretend, to know the opinion of the executive on the subject, because he had never heard the opinions of that department; but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken by the conduct of the executive in this particular case.

In his own mind, it was a sufficient defence of the president from an imputation of this kind, that the fact of Thomas Nash being an impressed American was obviously not contemplated by him in the decision he made on the principles of the case. Consequently, if a new circumstance occurred, which would essentially change the case decided by the president, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory as this defence might appear, he should not resort to it, because to some it might seem a subterfuge. He defended the conduct of the president on other and still stronger ground.

The president had decided that a *murder* committed on board a British frigate on the high seas was within the jurisdiction of

that nation, and consequently within the twenty-seventh article of its treaty with the United States. He therefore directed Thomas Nash to be delivered to the British minister, if satisfactory evidence of the murder should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If Thomas Nash had committed a murder, the decision was, that he should be surrendered to the British minister; but if he had not committed a murder, he was not to be surrendered.

Had Thomas Nash been an impressed American, the homicide on board the Hermoine would, most certainly, not have been a murder.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer. Thomas Nash was only to have been delivered up to justice on such evidence, as, had the fact been committed within the United States, would have been sufficient to have induced his commitment and trial for murder. Of consequence, the decision of the president was so expressed, as to exclude the case of an impressed American liberating himself by homicide.

He concluded with observing, that he had already too long availed himself of the indulgence of the house to venture further on that indulgence, by recapitulating, or reinforcing, the arguments which had already been urged.

NOTE II.

ON THE LAWS OF LOUISIANA.

In a note to a former volume of these Reports, (Vol. III. p. 202. note *a*,) the editor attempted to give a slight sketch of the sources from which the local laws of Louisiana have been

derived. From that statement, the learned reader will perceive, that they mainly spring from the Spanish law, with the following valuable history of which, the Editor has been favoured by Mr. Alexander Porter, jun. of Attakapas, in the State of Louisiana, by whom it was translated and compiled from the original Spanish writers. The Editor has taken the liberty of subjoining a few explanatory remarks to those made by Mr. Porter, and intended to illustrate the facts stated in the history.

History of the Spanish Law.

Remarks on the ancient state of the laws of Spain

The laws of Spain, in common with all the kingdoms of modern Europe, seem to have suffered a variety of changes, in the revolutions that took place at different times in her government, and in the gradual advances that the nation made from barbarism and poverty, to the comparative wealth and civilization, which distinguish her present condition. Spain, while a part of the Roman Empire, was governed, like all the other Provinces, by the laws of Rome ; and those principles of jurisprudence which *now* preserve their influence there, from the superiority of their wisdom, and the respect which is due to the immutable dictates of justice and truth on which they are founded, once had force and authority, from being promulgated and acted on by the ruling power of the State.*

Effects produced by the invasion of the Goths.

On the conquest of Spain by the Goths, it may be readily supposed, that a barbarous people, such as we know them to have been, were badly calculated to relish or adopt laws befitting

* No one can contemplate without emotion the great fortune and fame of the Roman people. "Comme si les grandes destinées de Rome n'etoient pas encore accomplies: Elle regne dans toute la terre par sa raison, apres avoir cessé d'y regnée par son autorité. On diroit en effet que la justice n'ait dévoilé pleinment ses mysteres qu'aux Jurisconsultes Romains. Legislateurs encore plus que Jurisconsultes, de simple particuliers dans l'obscurite d'une vie privée ont merité par la supériorité de leurs lumieres de donner des loix a toute la postérité. Lois aussi entendues que durables toutes les nations les interrogent encore a present et chacune en reçoit des reponses d'une eternelle verité. C'est peu pour eux d'avoir interpreté la loi de douze tables et l'edit du Preteur, ils sont les plus sur interpretes de nos loix mêmes; ils pretent pour ansi dire, leur esprit a nos usages, leur raison à nos coutumes, et par les principes, qu'ils nous donnent, ils nous servent de guides lors meme que nous marchous dans une route qui leur etoit inconnues."

Œuvres de D'Agueseau, tome 1. *p.* 157. *ed.* 1787.

the condition of a rich and polished people. Hence we find on the establishment of these invaders in that country, the Imperial or Roman jurisprudence fell immediately into disuse; and for a considerable period after the conquest, the usages and customs of the Goths were the only rule of action. A settled residence, however, in the country, producing a state of society widely different from the migrating and ever changing condition to which they had formerly been accustomed, created the necessity of something better calculated to meet the wants of their new situation; and laws and decrees of various kinds began to be passed at their national councils. At these meetings the clergy assisted; and it may readily be conceived, from their education and ability, that they were the sole persons in those ages capable of putting them in a shape by which they could be transmitted to posterity.

The code entitled *Fuero Juzgo.*

From these decisions of their national councils, and from various edicts of the Gothic kings, a work was promulgated in the 693d year of the Christian Era, which bears the name of "Fuero Juzgo."* This first code of the nation was divided into twelve books, and subdivided into various titles. The first books treated of the elections of kings,† and of legislators, and the

* This is among the earliest, though not the first code, published by those nations who, after destroying the Roman Empire, settled themselves in the south of Europe. The most ancient is the Salic Law, thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbonian wood, on the confines of Brabant and Hainault. It was written in the Latin language, about the beginning of the fifth century, by Wisogastus, Bordogastus, Sologastus, and Widowgastus, chiefs of the nation. The Burgundian and Ripuarian codes are nearly of as great antiquity. That of the Lombards, the most famous of all the systems of laws published by those barbarians, was written in Teutonic Latin, in the 643d year of the Christian era, about half a century before the "*Fuero Juzgo.*" This first effort of Spain in jurisprudence is totally overlooked, or rather seems to have been unknown to Butler, the learned author of the *Horæ Juridicæ.* Gibbon observes of this code, that it had been treated by the President Montesquieu, (*Esprit des Loix, l.* 28. *c.* 1.) with excessive severity. But he (Gibbon) says of it: "I dislike the style; I detest the superstition; but I shall presume to think, that the civil jurisprudence displays a more civilized and enlightened state of society, than that of the Burgundians, or even of the Lombards." *Gibbon's Decline and Fall of the Roman Empire, vol* 6. *c.* 38. *note* 125.

† In Castile, the people, or rather the nobility, asserted the right of trying and deposing their kings; in Castile and Arragon, the kings were long elective; and in all the Gothic monarchies of Spain, the power of the crown was extremely limited. *Robertson, Hist. of Charles V., vol. I. sec.* 3. *notes* 31-32. 33.

mode of passing laws.* The second, of judges, civil judgments, and the manner of prosecuting actions. The third, of marriages, successions, &c. The fourth and fifth, of the alienation of property belonging to the church, donations, contracts. The three following books are occupied with criminal law; the form of accusations, and the penalties attached to various crimes. The ninth contains the rules respecting fugitive slaves, deserters, &c. The tenth treats of partitions of lands, prescriptions. The eleventh, of the violation of sepulchres, of the sick, of physicians, of merchants. In the twelfth and last, of equity, of heretics, and of injuries.

This code, say the Spanish writers, though excellent in many of its parts, was better calculated for an elective monarchy than for that which now exists in Spain; and more conformable to the necessities of a warlike people, among whom, arts, agriculture, and commerce, had made little progress, than to a nation which (according to them) has made such eminent progress in them all.

* The legislative authority in the Spanish monarchy was long vested jointly in the King and the Cortes, the latter consisting of the nobility, the dignified clergy, and the deputies or *procuradores* of the cities and towns. Even after the *Cortes* ceased to be regularly assembled, and the government assumed the form of an absolute monarchy, it continued to be the usage to convene the Cortes in the lifetime of the reigning king, in order that they might take an oath of fidelity to his eldest son as heir apparent of the crown. This ceremony was performed during the reign of the late king, Charles IV., in 1788, when the Cortes were assembled for the sole purpose of swearing fidelity to his son, Ferdinand VII., the present monarch. Under the ancient constitution, no duties or taxes could be exacted from the cities and towns except what were freely granted in Cortes by the deputies of these communities. The law establishing this privilege was enacted in 1328, not many years after the celebrated English statute *de tallagio non concedendo*, securing the same right to the English people. "It is a curious fact, that this law, though violated in practice, was still retained in the Spanish *Recopilacion* till the reign of Charles IV., when it was expunged in the insolence of despotism, within a few years of that revolution which precipitated the degraded monarch from his throne, and restored to his people, not *that* only, but *all* the ancient rights of their fathers." The constitution which was established in consequence of this revolution, was abolished by Ferdinand VII. on his return to Spain in 1814; but has again been restored by another revolution, the accounts of which have just reached us; and which, it is to be hoped, may establish the liberties of the Spanish people on a permanent basis.

Situation of Spain from the 8th to the 10th century.

This code, however defective it may have been, formed the political constitution of the kingdom, until the invasion of the Moors in the year 714 nearly annihilated the Spanish Monarchy. The Goths who saved themselves from the storm were obliged to retire to the mountains of Asturias.—Cooped up in this narrow part of the kingdom, and engaged in continual wars waged with their invaders to preserve their existence or extend their dominions, it is not to be presumed that the improvement of their laws could occupy much of their attention, or any great progress be made in a science which owes a great part of its perfection in every country to the quiet and blessings of peace. Accordingly, we find that during the time the monarchy remained in that situation, their government and their laws partook in a great measure of that feudal system which about this period began to obtain so much force in all the countries of Europe, acting in some with more, and in others with less vigour, according as the circumstances of the particular country were in a greater or less degree favourable to its progress. The king, it appears, during this period, on making conquests from the Moors, distributed the lands among the nobles who assisted him in person and with their vassals during the wars. To the large cities and towns, various privileges were extended from time to time, as they were conquered and annexed to the Spanish Monarchy.*

Code entitled *Fuero Viejo*.

This change of situation in the condition of the people, the increase of power given to the nobles by the division of conquered lands, and the privileges extended to the cities, created a necessity for new regulations. Accordingly, in the year 992,

Analysis of the *Fuero Viejo*.

a code was published entitled *Fuero Viejo*. This work was divided into five books, each comprehending various titles. The first contained the laws by which the extent of the relative duties flowing from the king to the people, and from the people to the king, were ascertained; the obligation of vassals to their lords, and the extent of protection which the latter owed to the former; rules for the government of judicial

* *Robertson, Hist. of Charles V. vol. I. sec.* 3. *note* 34. Municipal corporations are of greater antiquity in Spain than in any other European country, except Italy. It was the prerogative of the crown to erect them; but the right was often delegated to the clergy and nobility. Their immunities were very extensive.

combats; the prohibition of the use of armed force by individuals; of vassals attached to the soil; of the inhabitants of free towns and their laws; and concludes with a title of the penalties inflicted on the powerful (*Los Poderosos*) who vexed or oppressed their vassals in towns by unjustly seizing their provisions from them. In the second book, were included the penal laws against various classes of crimes. In the third, titles directing the formalities which parties should observe who present their plaints in justice; of the various kinds of proofs and sentences; and this book concludes with titles which treat of debts and suretyship. In the fourth are given the laws which govern contracts; the manner of acquiring the dominion of things; of public works, and the construction of mills. In the fifth and last are found dispositions relative to the portion settled by the husband on his wife, ("*Las Arras*,") inheritances, partition of lands which were given to rent; and it concludes with the titles appertaining to tutors, disinheritances, legitimate and illegitimate children, with an appendix to the whole.

In this work, say the modern Spanish writers, were found the same defects as in the "*Fuero Juzgo*."—There is the same want of good and wholesome regulations for the protection of agriculture, arts and commerce: and the various titles which speak of judicial combats, the use of armed force by private individuals, with various regulations of a similar nature, plainly show, that the king at this period had not sufficient power to curb the haughty and licentious nobles, and restrain their actions within limits compatible with private security and public order.

A knowledge, however, of this code is even now considered as highly necessary in that country to those who aspire to the exalted ranks of their profession; it being regarded as eminently useful to the perfect understanding of many modern laws which treat of vassalage—the dominion of things considered as appendages to landed estate—the prerogatives of nobles, grandees, &c.

However justly this code of laws, as well as that of the "*Fuero Juzgo*," may be entitled to the censure of the Spanish writers of the present day, and although provisions compatible with such a state of society as then existed would be found

totally inconsistent with the well being of any of the kingdoms of modern Europe, yet it may be questioned if any other of the nations at present existing in that portion of the globe can boast of codes of equal antiquity and value ; and from the date of the promulgation of them it would appear that while England and the other nations of Europe were yet in the darkest stages of confusion and ignorance, Spain, by reducing her laws to a permanent form, was making no inconsiderable progress toward civilization.

Between the date of the promulgation of the Fuero Viejo in the year 992,and the year 1255, at which period was promulgated the "*Fuero Real*," two circumstances occured which occasioned a material change, not only in the laws of Spain, but indeed of all the nations of Europe. The one was the discovery at Amalfi of the Code and Pandects of Justinian, a work which astonished Europe, just emerging from barbarism, and which, as it contained the collected wisdom of the Roman Jurists, became at once an object of study and admiration to all men whose education placed it within their reach. The other was the collection of the decretals of the church, privately executed by a monk called *Gratian*, in the year 1151, and subsequently enlarged and improved by a compilation of authorities made in the year 1236, in virtue of an order to that effect made by Pope Gregory the IXth.

During the period of time that intervened between the discovery of the Pandects in 1137, and the publication of the "*Fuero Real*" in 1255, it is rather difficult to ascertain what authority the former code obtained in Spain. The modern Spanish writers state, (perhaps from a laudable feeling of national pride,) that the Roman jurisprudence has never been considered as the law of the land on the *peninsula* ; and it is not at this time binding as an authority. However true this may be when applied to the present state of jurisprudence in that country, matured and improved as it has been, by the experience of a long succession of ages ; and enriched as it must be by the incorporation of all that is most valuable in the Roman law ; yet it may be fairly questioned if it had not during the interval we speak of nearly superseded the use of the old Spa-

nish codes. This conclusion may be safely drawn : first, from its acknowledged superiority over the ill digested and barbarous laws of Spain, and indeed of every other nation then existing ; a superiority so striking as to be recognized even by the rudest and most uncivilized people to whom it was known. Secondly, from the influence of the clergy in that age—their well known attachment to this system of laws—the zeal with which they laboured for its introduction in every country of Europe, and their almost invariable success.* Lastly, from the very laws of the Spanish kings themselves, the codes published by their directions, viz. the "*Fuero Real*" in the year 1255, and the "*Partidas*" in 1260. Nearly all that is excellent in each of these compilations, seems to have been borrowed from the Roman law, and hence the presumption strongly arises, that the sovereigns of that country, finding the use of the latter becoming general, it was thought more politic to sanction it by the authority of the state : accomplishing at once two useful objects by this measure ; soothing national pride, and rejecting all those laws which were inconsistent with the then state of society in Spain.

Authority of the Decretals.

Of the collection of Decretals, (or decrees of the Pope before mentioned,) viz. those made by the *Monk Gratian* in his private capacity, and those made by *Rayamundo De Penafort* in pursuance of an order of Pope Gregory the IXth, the latter only are received as authority in Spain.

In the work executed by De Penafort, the method of the Roman Pandects is very closely pursued. It is divided into five books, each of which are again subdivided into various titles. In the first, after various preliminaries connected with a ca-

* These observations on the authority which the Roman law had in Spain, are not translated from the Spanish writers, but are my own ideas on the subject, introduced in the text, instead of a note, as better keeping up a connected view of the whole subject. The conclusions which I have drawn as to the influence of the civil law, are quite in opposition to the declarations of many Spanish authors; but they appear to me, for the reasons above stated, fair and natural. The immense influence of the clergy, in Europe, during the middle ages, is well known. They had at one time nearly succeeded in supplanting the common law in England, and contributed essentially to the establishment of the civil law all over the continent, either as the only municipal code, or as supplementary to it in all cases where it was silent or defective.

nonical collection, it treats of the dignities of persons, of Ecclesiastical judgments; which latter form also the subject matter of the second book. In the third, after treating again of the persons of Ecclesiastics and their benefices and prebendaries, some titles are subjoined upon the rules applicable to the construction of various contracts—how those ought to be interpreted which have for their object church property, or which appertain to its jurisdiction by reason of the personal privilege of the party defendant. The remainder of this book is occupied with the immunity of churches, of the regular clergy, and other matters of this nature. The fourth book is entirely occupied with the laws of the church respecting marriage, its antecedents, and consequences.—And the fifth and last treats of criminal jurisprudence, and of the penalties affixed to Ecclesiastical crimes, such as simony and other offences committed by persons belonging to the church. It also contains provisions respecting church censures, and concludes, in imitation of the Pandects, with the titles, the signification of words, and maxims of law. (*Reglas del Derecho.*)—As the sixth, and other later collections, pursue the same method with that above mentioned, a particular account of them is deemed unnecessary.

Change effected by St. Ferdinand and his son.

In this state of the civil, criminal and canonical jurisprudence of Spain, the *Holy king Ferdinand the III.*, about the middle of the 13th century, gave much more force, extension and solidity to the Spanish Monarchy than it possessed in former periods: as well by the glorious conquest of the kingdoms of Cordova and Seville, as by the prudence and sagacity with which he governed the countries he inherited and subdued. This Prince, and his son Alonzo, (surnamed the wise,) feeling that the multitude of particular jurisdictions, and the exorbitant privileges conceded to the nobility and gentry, divided and weakened the kingdom, determined, for the purpose of avoiding its entire desolation, to form a general body of laws, or code, which by its operation might unite all classes of society, and at the same time preserve a regular gradation of rank—prevent or destroy the dangerous and horrible effects of feudal anarchy, —confine the powerful nobles within the limits due to the prince—terminate the factions and discords between the fami-

lies of the great and their respective vassals—and finally establish good order by a judicious and correct administration of justice.

The death of Ferdinand the III. which took place a short period after the conquest of Seville in 1252, prevented him from carrying into effect his salutary and necessary projects. His son, however, (Alonzo the Wise,) who inherited his kingdoms, and, as it appears, all his father's views on this subject, carried his predecessors intentions into complete operation by the formation of two codes, the first called the "*Fuero Real*," and the second the *Partidas;* the former was executed in the year 1255, and was designed as a precursor to the great work of the *Partidas*.

Analysis of the *Fuero Real*.

The "*Fuero Real*" is divided into four books, each composed of different titles. The first commences with the laws which direct the observance of the christian faith—the preservation of the king and his children—presenting all the obligations of a christian and a subject as forming the basis of sound morals and correct conduct in private life—Afterwards follow the titles respecting the alienation of church property; and it concludes with those respecting public officers; V. G. alcades, lawyers, notarys public, &c. &c.

The second book is altogether taken up with rules respecting judicial proceedings—of the competent tribunals—of the commencement of suits—the "*Litis Contestatio*," or joining issue—the modes of proof, and exceptions thereto; and concludes with the mode of regulating final judgments. The third book is principally occupied with the regulations respecting matrimony, jointures, ("*Las Arras*,") acquests and gains, and the division of lands which are rented out: (*se dan a Plazos*:) afterwards of legacies, and estates in trust, inheritances, tutorships, and other points incident to these matters. From the tenth to the twentieth and last title of this book, are to be found the laws concerning various classes of contracts. The fourth and last book treats principally of Apostles, Jews, Saracens, and their slaves.

These regulations are followed by an enumeration of various penalties affixed to different crimes; and it concludes with the law respecting adoptions, emancipations, pilgrims, and ships.

From this analysis it will be seen, that the "*Fuero Real*" is a code enacted for the correct administration of civil and criminal jurisprudence among the different classes of the people, and the various provinces of the kingdom. In a word, it may be compared, as to its nature and object, to the institutes of Justinian, the primary object of which is the rights of persons and things, ("*Dericho particular*,") in which point of view its excellence has been long admired. But as the public law makes no part of its object, it has not touched on it; or, if mentioned at all, merely as incident to, or connected with, the subjects of which the said code professedly treats.

The Partidas.

The *Partidas*, which was concluded and published by the direction, and under the auspices, of Don Alonzo the Wise, in 1260, is a complete body of law [*El cuerpo completo*] which combines the public with the private law, all digested and prepared, says the author, [from which the account of this code is taken,] in a most scientific, just, solid, christian, and equitable manner; and which has not, perhaps, its equal in all Europe. The first Partidas is an exact compendium of the canon law as it existed at that epoch. The second is a refined summary of the ancient laws and customs of the nation, comprising in itself, and combining, the greatest political wisdom with a perfect legal history. The third, fifth, and sixth Partidas, contain an abridgment of all that is most valuable in the Roman law, respecting judgments, contracts, and last wills and testaments, each of which are well accommodated to the state of the monarchy at that time; and to the deciding and settling doubtful points of the civil law.*

The fourth is a compendium of the civil and canon laws appertaining to espousals, matrimony, and their material inci-

* An historical commentary upon the *Partidas* was published, at Madrid, in 1808, by Marina, the celebrated historian of Spain, in which valuable work he gives an account of the institutions of Leon and Castille; relates the efforts of Ferdinand III. and Alonzo the Wise, in municipal legislation; and analyses the *Partidas*, showing in what respects that celebrated code deviates from the ancient common law of Spain, and in what manner it was corrupted, (according to him,) from its primitive simplicity by an absurd imitation of the canon and civil law.

dents; and the seventh and last is, that which treats of crimes and their penalties, concluding in the manner of the pandects and decretals, with titles of the signification of words and rules of law.

This work, for the praise of which it has been a subject of regret to the Spanish writers, that their language is inadequate, comprehends so many rules of religion and justice, and of pure and christian policy, that a volume would be necessary to state (according to them) even the principal ones. For in truth, they add, what regulations can be conceived better adapted to national happiness, than that which points out the mode of succession to the kingdom?—What more convenient and honourable than that which prescribes that the king ought to honour all classes of useful subjects, including even labourers and artizans, by reason of their utility to the state? Where can any thing be found more conformable to true religion, and the spirit of the evangelist, that that which directs that he who is recently converted to the holy catholic church should be honoured and respected; what more honourable and equitable, than that which confines the punishment of crimes to the true delinquents, abolishing attainders and corruption of blood? and what more congenial to population, than that which promotes matrimony by the most cogent and persuasive reasons?

Notwithstanding its various and superlative merits, on account of the jealousy of the nobles, and of the fatal wound they found it would inflict on their privileges, and from other causes which began to operate after its formation, this code was not published until the year 1348, in the celebrated cortes held in the (*Alcala De Hemas*,) under the reign of Alonzo XI. And even then it is probable the death of this monarch, which took place in the year 1350, impeded, in a considerable degree, the effect it would otherwise have had. Its complete and beneficial operation may be dated from the year 1505, under the reigns of the celebrated *Don Fernando* and *Donna Juana*, in the famous cortes held in the city of Toro.

During the time that intervened from the formation of the Partidas, to its first publication in the cortes of *Alcala*, were

Laws *De Estilo.*

promulgated in the year 1310, *Las Leyes De Estilo*, which amount in number to 252, without any division into books or other parts. The greater part of these treat of judgments, civil as well as criminal; then follows a description of the persons who may appear in court, and the proofs necessary to adduce them. Others again treat of contracts and last wills.

As there are forms or mode of proceedings before the judges and tribunals, in the order in which the judgments are obtained, it is a natural consequence, that the said laws should include all that was practised at that time in litigating causes in the courts of justice—following as a rule of action, that which was contained in the laws or *Fuero*, and even in some particular cases against the provisions of the latter; as a special custom, legitimately introduced, derogates from the general laws. Finally, these laws of Estilo are taken notice of in our subsequent laws, and observed whenever it appears that they have been generally practised on.

State of the Spanish law in the 14th century.

From this statement of the various codes, it will be seen that until the middle of the fourteenth century the jurisprudence of Spain, consisted in the general and ancient usages and customs of the nation; reduced to codes which were called the *Fueros*, and that which belonged to the practice of the courts formed the *Leyes De Estilo*. For although the Partidas were then composed, which included a considerable number of civil and canonical decisions corresponding to all the branches of private and public law, yet as they were not published until the year 1348, in the cortes of Alcavala, there could not consequently be any authority attached to them on contracts or in courts of justice.

From this epoch, and particularly from the period of the cortes, held at Toro, in the year 1505, the aspect of the national law gradually changed: 1st. Because the Partidas being then published, they applied to all cases where there was not a particular statute (*fuero*) on the subject. 2d. Because the professors of the law in these ages, being passionately inclined, as well to the study of the canon as of the civil law, a great many of the principles of the former system were introduced, and remain in force, with certain modifications, to this day.

Some changes were made in these, and several new laws or ordinances were published, under the name of "*Pragmaticas*," from time to time, as necessity or the situation of the state required them. When they amounted to a considerable number, they were collected into one or more volumes by virtue of a Royal Ordinance, and acquired legislative force. Of this class was the first code of the *ordinance of Alcavala*, made and authorized in the year 1348. It is divided into 32 titles, each composed of different laws, relative to the manner of conducting suits, regulations on the subject of contracts and testaments, and penalties affixed to the commission of certain crimes.

Of the ordinances of *Alcavala*.

The second is that which comprehends the 83 laws which were made and published in the celebrated cortes, held at *Toro*, in the year 1505: providing for the solemnities of testaments—the right of succeeding, *ab intestato*, and by will. The legacies of the third and fifth, given by the testator to one heir in preference to another—the order of succession for the nobles of Spain—the support or aliment which fathers owe to their natural children—the penalties of adultery, and other incidental titles, which are inserted in the correspondent titles of the *Recopilacion*.*

Laws of *Toro*.

Before and after the cortes of *Toro*, there were made several collections of ordinances, proclamations, and other royal determinations; which were published, from time to time, as the circumstances of the monarchy required it. The first of which is known by the name of the "*Ordenamiento Real*," authorized and published by the Catholic King and Queen, Ferdinand and Isabella, in the year 1496, distributed into eight books, and then into different titles, in which were contained the entire or partial repeals that had been made of the *Fueros*, or ancient laws; also a few of the new provisions introduced. But

Ordenamiento Real.

* These laws of "*Toro*" are all included in the *Recopilacion*, but they are introduced into the latter work as new laws. Thus, in the Spanish law writers, we frequently find references made to them in this way, law 20 of *Toro*, which is law of the Recopilacion, &c.

as these are all inserted in the *Recopilacion*, with corresponding titles, a further explanation is unnecessary under this head.*

The Recopilacion.

The *Recopilacion* was first published in the year 1567, in virtue of an order made by Philip II. It includes the laws which are not repealed by the *Ordenamiento Real*, and the *Ordenamiento del Alcala*; all those of *Toro* and others, which had been published in the interim. From the year 1567 to 1777, there have been published various editions of this work with some short additions. But under the latter denomination we do not include the "*Autos accordados*," or resolutions or decrees of the council authorized and published by the king, who by a royal order united them in one volume, divided them into books and titles corresponding to those of the *Recopilacion*, and published them for the first time in the year 1745. They now form the third and last volume of this work, and are always printed with the original collection.

This work is divided into nine books, and composed of divers titles. The method used in it is well calculated to attain the object which the very name it bears would seem to imply; and, without any great labour, it is easy to find in it those edicts or laws which we have at any time occasion to examine.

The first book treats exclusively of the Catholic religion and ecclesiastical matters, and contains thirteen titles.

The second book, in its commencement, treats of laws in general; after which follow many titles prescribing the duties of the presidents of audiences, chancellors, judges, and inferior officers of courts. The most instructive title in this book, is that which speaks of the king's council ("*el concejo del Rey.*")

The third begins with laying down rules and regulations that ought to be observed in the various tribunals; it afterwards treats of the affairs of justice in cities and provinces,

* The "*Ordenamiento Real*," seems to have been a work or collection of the same kind with the *ordinance of Alcavala*, viz. collections of the Royal Ordinances or *Pragmaticas*. The latter collection comprised those up to the year 1348—the former, from that time up to the year 1496. The laws of Toro seem to have originated in the cortes or national assemblies, or, at least, to have been first promulgated there.

(*Los Corregidores,*) contains a variety of dispositions, with respect to the Alcades, or officers charged with the authority of permitting exports, &c.—the president and council of Bilboa—the council charged with that branch of rural economy connected with the management of cattle,* and concludes with regulations for the examination and reception of physicians, surgeons, apothecaries, farriers, &c.

In the first title of the fourth book, are found necessary rules and regulations for the proper maintenance of the royal jurisdiction. From thence, to the twenty-second title, is occupied with the law of the different species of judgments—some decisions of the ancient law on the subject—the mode of carrying on suits, and the time given for their termination—rules with regard to pleas, answers, the taking of testimony, the practice to be pursued in the courts of the first and second instance—proceedings against persons in contempt, &c. From the twenty-third to the thirty-third title is found the law defining the duties of sheriff, jailor, and the fees allowed them by law.

The fifth book is principally occupied with three subjects, and their incidents, viz. First, marriage; second, inheritances or successions; and, third and last, of contracts, concluding with the titles relative to banks and their officers—goldsmiths, &c. and the regulations established with respect to bakers, &c. In this book, say the Spanish writers, the most worthy of attention is the fourth title, which speaks of commissioners appointed to make wills; a singular authority, and not of any antiquity in their jurisprudence. The sixth, which treats of an heir who receives a legacy of the third or fifth of the property of

* This is a curious title. The assembly is composed of the richest and most extensive owners of cattle, sheep, &c. A member of the council presides at their deliberations, and they meet once every year. This meeting is called "*el honorado concejo de las mestas,*" an expression which does not admit of a literal translation. The Recopilacion contains a variety of provisions establishing the authority of this council, defining its limits. It may be gathered from the existence of this tribunal, and from the anxiety displayed by the Spanish government, from time to time, by its laws on this subject, what vast importance was attached to the inestimable flocks of merinos, of which they were for ages the sole owners.

the testator. The seventh, which provides for the succession of nobles, it being the first in any of the collections of the laws of Spain, where we find a distinct title appropriated to this subject. The fifteenth title prescribes the formalities which ought to be observed with regard to taxes, respecting which there had been, anciently, various disputes.

The provisions, or titles, of the sixth book, are more conformable than those of any other in the Recopilacion to the ancient codes of Spain, *los fueros antiguos*, and those which are contained in the second *Partidas*. They treat of knights and of gentlemen, of towns, of vassals, of cattle, and fortresses—of the *cortes*—of ambassadors, inspections, tributes, ports—of those exempted from taxes and not subject to the prohibition which prevents certain articles from being exported. And the book concludes with the titles respecting the hunter, gamekeeper, and fowler, of the king. One of these titles is respecting the young of horses of a noble race.

The seventh begins with the matters that conduce to the good government of Corporations—of the rents and property of councils—of the privileges of cities—of taxes—of public limits and commons. Then follow various titles which have no connection either with each other, or with the antecedent ones; as, the tenth speaks of ships—the eleventh, which speaks of artisans—the twelfth, which contains regulations with respect to dress. From the thirteenth to the seventeenth, is taken up with rules respecting the cloth manufactories, and concludes with those of chandlers and manufacturers of tallow, and the tanners and braziers of the kingdom.

The eighth book maintains a more perfect connection between its title and the matters contained therein. It begins with the preparatory steps for the ascertaining of offences, and then proceeds to the twenty-third title, with the penalties affixed to each crime, according to its grade; among which, say the Spanish authors, is worthy of note, the eighth, which imposes the pain of death, ["*ultimo supplicio*,"] with other penalties, against any person who sends a challenge or accepts one.

In this provision, they say, is seen the difference between the

ancient and present state of the monarchy. The authority of the laws was not then sufficient to punish the individuals attached to, or connected with, families of vast opulence and power, who might commit violations of good order; duels were, therefore, permitted; regulations fixed for carrying them publicly into effect, and the strongest vengeance of the law, as well as the more dreadful punishment of public contempt, awaited those who, either injured or injuring, failed to resort to this mode to obtain satisfaction, or give redress. The nobles, at last, as the light of knowledge began to dawn, perceived the superior advantages of recurring to the laws instead of resorting to these public and solemn combats. A change, correspondent to the alteration in the general opinion, took place, and duels are now placed on the same footing in Spain, as in every other well-regulated country in Europe, condemned by the laws of God and man, forbidden by the maxims of religion; yet still practised by the obedience of all men to a false code of honour, which is unequal in its principles, and almost always cruel in its operations.*

The ninth, and last book, is occupied with details in all its branches of the royal treasury; the office of treasurer and auditor of the public exchequer; of those who compose the treasury council. Then follow the judicial regulations for the recovery of taxes, of the royal rents, &c. In continuation, are

* The institution of judicial combats, or trial by battle, was universally established in Europe by the barbarous nations who established themselves on the ruins of the Roman empire; (*Montesquieu, Esprit des Loix, l.* 28. *c.* 14. 18. *Gibbon, Decline and Fall,* &c. *vol.* vi. *c.* 38. *note,* 84. *Robertson, Hist. of Charles V. vol.* i. *sec.* i. *note,* 322.) and was even transported by their posterity into the kingdoms founded by them in the East, during the crusades, as appears by that venerable monument of feudal jurisprudence, the *Assise of Jerusalem.* (*Gibbon, Decline and Fall,* &c. *vol.* xi. *c.* 58.) "It has been slowly abolished by the laws and manners of Europe," and had a legal existence even in England, (though not practically used,) so recently as the year 1818, when it was formally suppressed by act of Parliament, in consequence of the attempt to resort to it in the appeal of murder prosecuted in the case of Ashford v. Thornton, which will be found reported in 1 *Barnwell & Alderson's Reports,* 405, and in which the ingenuity of the learned judges was perplexed to contrive the means of evading this species of trial, which was demanded by the accused.

found, the tariff of duties levied by the king on each article sold within the kingdom, the confiscation of contraband, &c. &c.

A more extensive analysis has been given of this work than of any other, because, as it is last in time, it is first in authority.

The author, from whom this account is principally taken, observes, that in the work entitled, "*Autos Accordados*," there are wanting many titles, which are to be found in the Recopilacion.

Since the publication of the Recopilacion, there have been issued by the kings of Spain, a vast number of proclamations, decrees, instructions for governors of Spanish America, "*Royal cedules*," which have not as yet been compiled, although there was an order of the king in council to that effect. The want of a general collection of these laws, is very frequently and seriously deplored by the Spanish lawyers.

From this short statement of the rise and progress of the Spanish law, it will be seen, that the antient codes of Spain have been, like that of almost every other country in Europe, nearly supplanted by modern changes and improvements; yet an acquaintance with them is necessary to him who wishes to understand the laws of his country, and aspires to rise to the higher honours of his profession. This knowledge, indeed, has become indispensable, since the order of council, passed the 4th of December, 1713, in reference to many laws anterior to the "*Fuero Juzgo*," and which are found in that work, the *Partidas*, the *Ordenamientos*, the *first law of Toro*, the new Recopilacion, &c. It provides, that in the conducting and deciding of causes, the courts of justice shall be governed by the Recopilacion, the ordinances and decrees, the laws of the Partidas, and the other codes, ["*Los otros fueros*,"] notwithstanding it is said they have become obsolete: and in case nothing can be found on the subject, in any of these codes or laws, then that recurrence shall be had to the sovereign authority to decide on them. This decree was confirmed by Philip V., June 12th, 1714; directing the ancient laws which had not been repealed to be observed, although they might have been generally considered as void by non-user.

Between all these codes, and the laws of the Indies, there

exists a great connection. In the American provinces of Spain, the study of the civil law is a part of their education at the universities; and by the laws for the government of these provinces, it is expressly provided, that where the *Recopilacion de las Indias* is wanting in provisions for any case that may arise, recourse shall be had to the laws of Castile or Spain.

Recopilacion de las Indias.

The "*Recopilacion de las Indias*," the collection of laws of the Spanish provinces, is very similar to the "*Recopilacion*," of which so much has been said, both in its order and materials.

Analysis of the Recopilacion de las Indias.

In the first book are inserted all the definitions concerning points of ecclesiastical law. In the second, after speaking of laws in general, it prescribes the order of government for the council of the Indies, and the other superior and inferior tribunals thereof. The third begins with the subject of the royal domain, and provides for its officers; then treats of viceroys, presidents, and governors, and of military affairs; and concludes with the title concerning ceremonies, post offices, and Indian couriers. The fourth book commences with the laws relative to discoveries by sea and land; treats afterward of cities, their population, and of their rights and contributions; of gold and silver mines, and incidental matters; and concludes with regulations for the pearl fishery, and the manufactory of cloth. The fifth book treats, principally, of the boundaries and divisions of the different governments; after which follow many miscellaneous matters, v. g. that of the Holy Brotherhood—of the assembly for the police of cattle—of physicians and apothecaries—of the order of judicial proceedings, and concludes with a title respecting the domicile of individuals. The sixth book is occupied nearly throughout with the laws respecting Indians, the commandants placed over them, &c. The seventh is taken up with criminal jurisprudence. The eighth, with the laws respecting the royal treasury; and the ninth with regulations respecting the armada, or fleets, by means of which the commerce of Spain was formerly carried on with the colonies. But these regulations are now obsolete.

This work, it may be seen from the analysis of it, is of a

very limited nature, and seems almost entirely confined to regulations respecting the functionaries of the government in those countries; leaving the subject of contracts, the rights of persons and things, &c. &c. to be regulated by those laws which are in force in old Spain respecting them. The order in which those laws govern, may be seen by reference to this short history, applying to them this concise, but universal maxim, that those which are last in date are first in authority.

The Ordinanza de Bilboa.

The ordinance of Bilboa is a commercial code of great value.

NOTE III.

ON THE SUBJECT OF PRIZE LAW.

In order to complete the information contained in the former notes to these Reports, on the subject of prize law, the editor has thought proper to subjoin to the present volume the text of the chapters of the *Consolato del Mare*, on that subject, as translated by Dr. Robinson, and of the principal ordinances regulating the practice of the tribunals on the European continent, in matters of prize, which are found scattered in different books, not always accessible to the general reader. The prize code of Spain is, in general, copied from that of France; but wherever any considerable differences occur, the editor has noted them in the margin. The prize codes of the new states, which have recently arisen in Spanish America, and which are now engaged in war with the parent country, are also modelled upon those of France and Spain, as will be seen by a reference to the prize ordinance of Buenos Ayres, annexed to the 4th volume of these Reports. These pieces will show, that, except the severe rule condemning the goods of a friend found on board the ship of an enemy, and the more relaxed principle of free ships free goods, both of which have occasionally been adopted by certain powers, together with some other less im-

portant anomalies, the leading principles of prize law, as now administered, have been established and acted upon by the principal maritime states of the world from a very early period.

As a further apology for inserting them in this place, the editor begs leave to refer the learned reader to the following observations of Sir William Grant, in a question arising upon a warranty of neutrality in a policy of insurance, alleged to be falsified by a sentence of a French court of admiralty grounded on the ordinances of France. "These ordinances," says that accomplished judge, "have been misunderstood; sometimes by the French Courts of Admiralty themselves, and sometimes by the courts in this country. Those in France considered these ordinances as making the law, and as binding on neutrals, and have, therefore, sometimes declared, in the same breath, that the property was neutral, and yet that it was liable to condemnation: whereas, all that was meant by those ordinances was, to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When Louis XIV. published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in France. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet, as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences should not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain *principles of decision*, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. And it was truly observed at the bar, in the course of the argument, that it has been matter of complaint against us, (how justly is ano-

ther consideration,) that we have no code by which neutrals may learn how they may protect themselves against capture and condemnation. Now, this court, in this case, seems to us to have well and properly understood the effect of their own ordinances. They have not taken them as positive laws binding upon neutrals, but they refer to them as establishing *legitimate presumptions*, from which they are warranted to draw the conclusion which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation." *Marshall on Ins.* 426.

EXTRACT FROM THE CONSOLATO DEL MARE.

CHAP. CCLXXIII.—*Of Merchant Vessels captured by an armed ship.*

Ship and cargo being both enemy's property.

Section 1.—If an armed ship, or cruizer, meets with a merchant vessel belonging to an enemy, and carrying a cargo the property of an enemy, common sense will sufficiently point out what is to be done; it is, therefore, unnecessary to lay down any rules for such a case.

Of a neutral vessel, the cargo being enemy's property.

2. If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of recapture, paying to the vessel the whole freight, which she would have earned at her delivering port; and this freight shall be ascertained by the ship's papers, or in default of necessary documents, the oath of the master shall be received as to the amount of the freight.

Respecting the carrying on of the prize cargo by the neutral vessel.

3. Moreover, if the captor is in a place of safety, where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, the neutral vessel is bound to carry it thither; but for this service, there ought to be a compensation agreed upon between them; or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, *or even more*; and this is to be understood

of a ship that has arrived in the place where the captor may secure his prize; that is to say, in the port of a friend; and going on an ulterior voyage to that port, to which the captor wishes her to carry the cargo which he has taken.

Claims by the master or crew.

4. If it shall happen that the master of the captured vessel, or any of the crew, shall claim any part of the cargo as their own, they ought not to be believed on their simple word; but the ship's papers or invoice shall be inspected; and in defect of such papers, the master and his mariners shall be put to their oaths; and if, on their oaths, they claim the property as their own, the captor shall restore it to them; regard being paid, at the same time, to the credit of those who swear and make the claim.

If the neutral ship refuses to carry the cargo, &c.

5. If the master of the captured vessel shall refuse to carry the cargo, being enemy's property, to some such place of safety, at the command of the captor, the captor may sink the vessel if he thinks fit, without control from any power or authority whatever, taking care to preserve the lives of those who are in her. This must be understood, however, of a case where the whole cargo, or at least the greater part, is enemy's property.

Of an enemy's ship with a neutral cargo.

6. If the ship should belong to the enemy, the cargo being either in the whole, or in part, neutral property; some reasonable agreement should be entered into, on account of the ship now become lawful prize, between the captor and the merchants owning the cargo.

Neutral merchants refusing to enter into agreement about the cargoes, &c.

7. If the merchants refuse to enter into such an agreement, the captor may send the vessel home to the country whose commission he bears; and in that case the merchants shall pay the freight, which they were to have paid at the delivering port; and if any damage is occasioned by this proceeding, the captor is not bound to make compensation, because the merchants had refused to treat respecting the ship, after it had become lawful prize; and for this farther reason, also, that the ship is frequently of more value than the cargo she carries.

Captor refusing to enter into agreement, &c.

8. If, on the other hand, the merchants are willing to come to a reasonable agreement, and the captor, from arrogance, or other wrong motives, refuses to agree, and forcibly sends the

cargo away, the merchants are not bound to pay the whole, nor any part of the freight; and, besides, the captor shall make compensation for any damage he may occasion to them.

Of agreement on credit, &c.

9. If the capture should be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheless, men of repute, and worthy to be trusted, the captor shall not send away the vessel without being liable to the damage; but if the merchants are not men of known credit, and cannot make good their stipulated payment, he may then act as it is above directed.

Chap. cclxxxvii.—*Of Cases of Recapture.*

Ships recaptured before they have been taken into a place of security.

Section 1.—If a ship is taken by the enemy, and afterwards another ship of a friend comes up, and effects a recapture, the vessel, and all that is in her, shall be restored to the former proprietors, on payment of a reasonable salvage for the expense, and trouble, and danger, that have been incurred; but this is to be understood of recaptures effected within the seigniory or territorial seas of the country, to which the captured vessel belongs, or before the enemy had secured the vessel to himself in a place of safety.

Ships recaptured in the enemy's territory, or being in a place of security.

2. If the recapture has been effected within the enemy's territories, or in a place where the enemy was in entire possession of his prize, that is, in a place of security, the proprietors shall not recover, nor shall the recaptors claim any salvage; for they are entitled to the whole benefit of the recapture, without opposition from any rights of seigniory, or the claims of any person whatever.

Ship deserted by the enemy, and through fear of a friend appearing in sight.

3. If an enemy, having made a capture of a vessel, quits his prize on appearance of another vessel, either from fear, or from any doubt that he may entertain of her, and the vessel, on whose account the captured ship was abandoned, takes possession of the vessel that has been relinquished, and brings her into port, she shall be restored to the proprietor, or his heirs, without opposition, on payment of a reasonable salvage, to be

fixed, by agreement between the parties, or if the parties cannot agree, by the arbitration of creditable persons.

Ship deserted by the owner, through fear of an enemy, but not taken into the possession of the enemy.

4. If it should happen that any one abandons his vessel through fear of his enemy, and any friendly vessel falls in with the ship that has been deserted, and brings her into a place of security, that is to say, in a case where the finding vessel has not retaken the ship from the enemy, and where the enemy had not carried her into a place of security, and had not taken her from the owner, the finders shall have no claim to the vessel, nor to the cargo on board, but, by the use and custom of the sea, they may demand a reasonable salvage, to be settled either by agreement, or by reference to the arbitration of creditable persons; for it is not fit that any one should endeavour to take undue advantage of the misfortunes of another, since he cannot foresee what may happen to himself; and because, every one should be ready to submit his disputes, especially in cases like the present, to the arbitration of two unexceptionable persons.

Cases of fraud.

5. It is besides to be understood, in all that has been said, that every thing shall be done without fraud; for no man can tell what may be his own case; and it sometimes happens that the deceit and injury which a person attempts to practise on others, light upon himself: therefore, if any persons, knowing that a ship is going on a voyage, where she must be exposed to danger or alarm from the enemy, fit out a vessel with a view, and for the purpose of doing injury to that ship or any other, in making salvage at their expense; or with a design of getting possession of the ship and cargo: if it can be proved against them, that they went out with any such intention, such persons shall not be entitled to any salvage on the ship or cargo, although the owner may have abandoned her; nor even, although she may have been taken by the enemy.

Farther regulations respecting fraud.

6. If those who fitted out the vessel cannot establish, in proof, that they did not arm with any of the before-mentioned intentions; or if it should be proved against them, that they armed for the purpose of doing injury to any one, or generally to all, whom they might meet, in the form and manner of enemies; in such a case, whether they bring in a vessel, with or

without a cargo—whether it shall be retaken from the enemy, or merely found by them, they shall take no benefit from it, but the whole shall be restored to the former proprietors; and moreover, such persons, so arming, shall be delivered over to justice, to be treated as robbers and pirates, if the fact can be established in proof.

Continued.

7. If they are not convicted of such an intention, having either retaken or found a vessel in any of the situations abovementioned, they shall be entitled to their full right and benefit, according to the preceding regulations. But if the matter shall remain in doubt, or if it shall rest with them to disprove the charge, neither they, nor any that were with them, nor any that are interested in the event, shall be received to give evidence in their favour; nor shall any person of a covetous disposition, nor any one who may be suspected of being biassed by money, be a witness for them.

Ships voluntarily deserted by the enemy.

8. If an enemy shall have made a capture of a vessel or cargo, and shall afterwards abandon it, voluntarily, and not from any fear or apprehension of any vessel coming upon him; and if any persons shall find the vessel or cargo that has been voluntarily abandoned, and bring it to a place of security, the property shall not be acquired to them, if any owner can be found; but they shall receive a reasonable salvage, to be fixed, at the discretion of reputable persons of the place, to which the ship or goods shall be carried.

No owner appearing.

9. If, after the expiration of a reasonable time, no owner comes forward, the finders shall receive for their salvage one half of the proceeds, and the other half shall be applied in the manner that has been expressed and declared in a preceding chapter.*

* In chapter 249. the same proportion of a moiety is given to the finder of goods found floating in port, &c. after the expiration of a year and a day, if no owner appears to claim. The other moiety was to be divided into two parts, of which the Lord of the Jurisdiction was to retain one; and to apply the other *to pious purposes*, for the soul of the proprietor—"*All hora la giustitia debba dare a quello che trovata l'haverà, la metà per suo beveraggio, et della metà che rimanerà, debba fare la giustitia due parti; et può pigliarne lui una parte, et l'altra che rimane, debbela dare per amor di Dio, dove a lui piace, per l'anima di quello, di chi sarà stata.*

10. If the enemy, being in possession of any ship or cargo, shall not have deserted it voluntarily, but shall have been obliged to abandon it by storm or tempest, or on account of any ship or vessel by whom he may have been alarmed, the same rule shall be observed as if the enemy had quitted the same voluntarily, and of his own accord. Abandonment by the enemy, in distress, &c.

11. If the enemy, after a capture, comes to any place where he takes a ransom for his prize, if the proprietors wish to have their vessel or cargo again, he or they, who have ransomed her, are bound to deliver her up to the original owners, on payment of the debt and charges, and some further allowance besides, if they choose to accept it. Captured property ransomed.

12. If an enemy, on capture of a ship or cargo, shall make a gift of it; such a donation or gift shall not be valid on any account; except that if a gift is made of the ship or cargo, to those to whom it belonged, such donation shall be valid. But if the captor bargains with the master in these words, "We are willing to give you your ship for nothing, but must have a ransom for the cargo," such a donation shall not be good; because, in the case of which we are now speaking, the enemy had not carried it to a place of security, so as to say, that he might not lose it; notwithstanding that he might so far have obtained power over his prize, as to be able to burn or sink it; though, in such case, it would be totally lost both to him and to the owner; it is to be understood, therefore, that if the cargo is ransomed, the master to whom his ship has been so given, is bound to contribute to the ransom paid for the cargo according to the value of the ship; and the same rule shall be observed, *e contra* also, and applied equally to the ransom of ship or cargo. A gift of captured property; when valid.

13. If the captor shall have taken the prize to a place of security; that is, if it shall have been carried out of the seas of the enemy, where a recapture might be effected; if when the captor shall have it in safe possession, and in his own power, he shall make a donation, or sale of the ship or cargo, such a donation or sale shall be valid, without exception, from any quarter; unless he, to whom the donation was made, should have accepted it with an intention of doing a kindness to the Gift, or sale of a vessel, in a place of security.

owner, and for his benefit; in that case, he may restore it if he pleases; but otherwise, he is not compellable by any person, nor on any account.

Cases of fraud excepted.

14. If, however, he, to whom the property belonged, can show that there has been any *fraud* in the business, the donation shall not, on any account, avail; but he, to whom it was made, ought to be seized by the lord of the country, and punished in goods, and in person, according to the circumstances of the case; and the ship or cargo shall be restored to the former owner.

Sale in a place of security; proof of sale.

15. If the ship or cargo shall have been *sold* by the enemy to any one, the sale shall be valid, provided that he, who has purchased, can show that the sale was made to him by the enemy in a place of security, that is, where the enemy held the goods in question, *in suo dominio;* and in case any one, who pretends to have acquired the ship or cargo by a just title, cannot prove the asserted sale, it shall not be valid; and if the former owner appears, and can make proof of his property, it shall be restored to him. The evidence of these disputed claims shall be discussed before two reputable persons of the country where the dispute arises, and without fraud; and if any fraud is discovered, the party against whom the fraud is proved, shall be bound to pay to the other party, *costs, damages,* and interest; and besides, the party consenting to the fraud shall be delivered over to the justice of the country.

Property recovered by the master restored.

16. If the master, or person acting for him, recovers the ship or cargo by any means, he is bound to make restitution to the proprietors, according to their several proportions, on payment of the expenses *pro rata.*

Redemption by the master, with the consent of the proprietors, or the major part.

17. If the master shall redeem any part of the cargo, or make any agreement *with the consent* of the major part of his copartners, by which he shall regain the ship or cargo, he may compel them to contribute, by course of justice, because they are as much under an obligation to him, as if they had agreed to take part in building or purchasing a new ship.

Without their consent.

18. But if the master makes any agreement, *without the consent* of his partners, or the major part of them, they are not

bound to any thing, unless they like it; nor is the master answerable to them for the rights and interests which they had in the ship at the time of capture; saving for any previous accounts which might be still remaining unsettled, respecting their shares in the ship or cargo at the time it was taken by the enemy.

Resumption by the owner.

19. If the original proprietors are disposed to resume their shares, and the master makes any opposition, the justice of the country may compel him to acquiesce; for there can be no ground of reasonable resistance on his part, if they are willing to pay their proportion of the expense; and it would be manifestly unjust that any one should dispossess the rest of their property.

In case of their refusal.

20. But if the master, or any one for him, redeems his ship or cargo, after the enemy has gained a just title in it, and those who were part owners refuse to pay, as before specified, the master, or his agent, ought to repeat his demand upon them several times, and call upon them to pay their share; and if they still refuse, it shall be put up to auction, with permission of the government, and be disposed of to the best bidder.

Case of surplus after refusal.

21. If the ship or cargo shall be sold for more, after such refusal, than the ransom paid, the surplus shall be paid to the owners, according to their shares, if the master chooses it; otherwise, he is not obliged. And the master shall have the privilege of retaining the goods in question at the price that others are willing to give for them.

Case of deficiency.

22. If the sale shall not produce *so much* as the ransom; if the master made the ransom without the consent of his partners, they are not bound for the deficiency, unless they choose it; and therefore it is reasonable that the master, or his agent, should have the privilege of retaining, at the price that any other person would give, as the deficiency would fall upon him; saving, however, that if any of the partners are inclined to resume their shares, they are bound to make good the deficiency to him *pro rata*. All the reasonings, and cases, and conditions above-mentioned, shall be taken under the supposition that the enemy had carried the prize into a place of secu-

rity; and that the ransom or sale had been made fairly, and without fraud.

POSTSCRIPT.—It may not be improper to add, as an observation pointing out the chasm between the regulations of this ancient code, and the prize ordonnances of particular countries, and the provisions made in public treaties, in later times, on the subject of prize; that neither the laws of *Oleron*, nor the ordonnances of *Wisbuy*, nor the *Guidon*, nor the ordonnances of the *Hanse Towns*, contain any regulations respecting the general Law of Prize; scarcely mentioning the subject, except incidentally, amongst the accidents to which merchant vessels are liable. There are, in the Black Book of the Admiralty, a few, and but a few, articles respecting it. In the ordonnances of *Barcelona*, of 1340, there are also a few articles, but relating rather to the division of interest between the captors, than to the general subject.

EXTRACTS FROM THE CODE DES PRISES.

Articles relatifs aux Prises, Extraits de L'Ordonnance de Charles VI. sur le faict de l'Admiraulté. Du 7 Decembre, 1400.

Jurisdiction of the Admiralty, as to captures of war, and other matters arising at sea.

ARTICLE III.—Se aucun de quelque estat qu'il soit, mettoit sus aucun Nauire à ses propres despens pour porter guerre à nos ennemis, ce sera par le congé et consentement de nostredit admiral ou son lieutenant, lequel a ou aura au *droict de son dit office* la cognoissance, iuridiction, correction et punition de tous les faits de ladite mer et des dependances, criminellement et ciuillement, &c.

Proceedings before the admiral, or his lieutenant, in matters of prize.

ART. IV.—De toutes les prinses qui d'oresnauant se feront sur la mer, par quelques gens que ce soyent, tenant nostre partie, ou souz ombre et couleur de nos guerres, leurs prisonniers en seront amenez ou apportez à terre deuers nostre admiral, *ou son lieutenant*, lequel tantost et incontinent les examinera auant que nulle chose se descende, pour sçauoir le pays dont ils sont, et à qui appartiennent les biens s'aucuns biens y auoit, pour garder iustice, et faire restituer ceux qui sans cause auroyent esté dommagez, si le cas estoit trouué tel.

ART. VI.—Que d'oresnauant, s'aucune telle prinse se fait, ledit admiral ou son lieutenant s'informera deuement et le plus veritablement que faire se pourra, aux preneurs et à chacun à part de la maniere de la prinse, du pays ou coste où elle aura esté faite ; verra et fera veoir les marchandises et les nefs par les gens cognoissans à ce. Et par bonne et meure délibération regardera par la conscience ou contention, les dépositions d'iceux preneurs ainsi faite en secret, ou par la veuë desdites prinses, *s'il y a vraye apparence qu'elles fuissent de nos ennemis*, auquel cas icelles seront déliurées aux preneurs, en prenant leurs noms pour en auoir recouure sur eux, s'aucune poursuite en estoit faite, auec inuentaire des biens. Et s'il y a mieux et plus éuidente présumption par aucuns des moyens dessusdits, qu'il y eust quelque faute, et que lesdites prinses fussent des contrées de nostre royaume, ou des pays de nos alliez, icelles prinses en ce cas seront par nostredit admiral mises en seure garde, aux despens de la chose, ou desdits preneurs, si le cas le requiert, jusques à temps compétent, dedans lequel sera fait diligence d'en sçauoir la vérité. Et si lesdits preneurs estoient gens soluables, et qu'auec ce ils baillassent bonne et seure caution desdites prinses, icelles deuëment appréciées et inuentoriées, se pourront bailler à iceux preneurs, s'il n'y a trop grande suspection.

Examination on suspicion of enemy's property.

ART. VII.—Et si aucuns desdicts preneurs en leur voyage en especial auoient commis faute telle qu'ils fussent attaints d'auoir enfrondé aucuns Nauires, ou noyez les corps des prisonniers ou iceux prisonniers descendus à terre en aucune loingtaine coste, pour céler le larrecin et meffaict, voulons que sans quelque délay, faueur ou déport, nostredit admiral en face faire punition et iustice selon le cas.

Misconduct of captors to be punished in the Admiralty.

ART. VIII.—Lesdits preneurs empeschans aucuns marchands, *Nauire* ou *marchandise* sans cause raisonnable, ou qu'ils ne soyent nos aduersaires, nostredit admiral fera deuëment restituer le dommage, et ne permettra plus l'vsage qu'ont à ce contre raison tenuë, iceux preneurs, en quoy ils ont faict et donné de grands dommages à aucuns de nos alliez par feinte, ou fausse couleur qu'ils mettoyent de non cognoistre s'ils es-

Compensation for damage done, &c.

toyent nos aduersaires, ou non, qui est chose bien damnable, contre raison et iustice, que homme soubs telle couleur deust porter dommage, ou destourbier.

Captors violating ancient usage and ordonnances, &c.

ART. IX.—Pour ce qu'il est voix et publique renommée, que quand aucune prinse est maintenant faicte sur nos ennemis, les preneurs sont si accoustumez de faire et vser de leurs *volontez* et à leur profit, qu'ils ne gardent en rien *l'vsage* que l'on dict anciennement en ce estre ordonné : mais sans traicté de justice souuent inobédiens, pillent et rompent coffres, et prennent ce qu'ils peuuent. En quoi nostredit admiral et les seigneurs et gens d'autre estat qui ont mis sus les Nauires à grands despens, sont excessiuement fraudez, et si aduient par faute de iustice souuent de grandes questions, noyses entre les preneurs, qui sans craincte, et par cy-deuant chacun de sa volonté sans en estre punis en ont ainsi vsé.

Such ancient usages, &c. to be observed.

ART. X.—Et quand aucune prinse estoit trouuée appartenir à nos subiects et estoit par justice restituée, on ne pouuoit trouuer les biens, ne sçauoir qui les auoit euz, nous auons ordonné que d'oresnauant *l'vsage ancien* sera en ceste partie estroittement gardé sans enfraindre : c'est à sçauoir, que s'il y a aucun qui rompe coffre, balle ou pippe, ou autre marchandise que nostredit admiral ne soit présent en sa personne *pour luy*, il forfera sa part du butin et si sera par iceluy admiral *puny* selon le meffaict.

Oath to be made by cruizers on going out of port, for good conduct, &c.

ART. XI.—Si nostredit admiral, ou aucuns de ses lieutenans, n'estoient en personne aux entreprises qui se feront sur ladite mer pour tenir ordre à iustice entre ceux de ladite entreprise, les maistres, chefs, capitaines ou patrons, auant leur partement, feront serment, ainsi que dessus est dit, qu'à leur pouuoir ils deffendront nos subiects sans leur porter dommage. Et toutes les prinses qu'ils feront, les ameneront à terre, et en donneront cognoissance certaine audit admiral et luy déliureront ceux qui pour le voyage auront commis quelque meffaict contre nosdites ordonnances, ou autrement.

Sale and distribution of prize goods, to be made by order of the Admiralty.

ART. XII.—De toutes les prinses qui se feront par ladite mer, les vendus butins et départemens en seront faicts deuant nostredit admiral, ou son lieutenant, qui fera retenir par-deuers

luy, d'iceux biens, ject et compte, pour y auoir recours, pour ceux qui en auront besoin, et pouuoir cognoistre le fait et estat d'icelles prinses.

Art. XVIII.—A ce que ledit admiral dit auoir droict sur les prisonniers prins sur la mer, et par ladite mer, lesquels droicts leur aduiendront souuent, qu'en demeurera la part moindre, ceux qui les auront prins ; d'oresnauant nostredit admiral ne se pourra ayder de chose qui en ait esté vsé, mais déclarons que sur lesdits prisonniers il ne pourra demander que son Dixiesme, auec le droict de son sauf-conduict, ny auoir la garde d'iceux, sinon en tant que monteroit le faict et portion de son Dixiesme, s'il n'estoit prisonnier de si grand prix et les preneurs de si petite essence, qu'il ne fust pas bon les laisser en leurs mains. Excepté que si aucun, sans congé ou consentement dudit admiral ou personne de par luy, mettoit quelques prisonniers à finance, il (par priuilege de son office) pourra prendre lesdits prisonniers en sa main, en payant ladite finance ; et sur le prix rabatu son droict de Dixiesme.

Rights and perquisites of the admiral, &c.

Articles Extraits, de l'Edit. concernant la Jurisdiction de Admirauté de France. Du mois de Mars, 1584.

Article XXIV.—Si une Nef estrangere veut entrer en un port ou havre de nostredit Royaume, faire ne le peut, sans l'auctorité et congé de nostredit Admiral ou de ses Commis, si par fortune ou tourmente de mer n'y estoit entrée par force ; et qu'aucun Pilote ne l'ameine, et la puisse guider ne conduire audit havre sans demander congé à nostre dit Admiral. Et d'advantage incontinent ils seront tenus venir vers nostredit Admiral, ou son dit Lieutenant audit lieu, pour faire entendre le lieu dont ils viennent. Et aussi à ce que nostredit Admiral ou son dit Lieutenant les puisse interroger de ce qu'ils auroyent veu en leur voyage, pour nous en avertir si besoing estoit.

Inquiries to be made of foreign ships coming into port.

Art. XXXIII.—De toutes les Prinses qui se feront en mer, soit par nos subjets, ou autres *tenans nostre party*, et tant soubs ombre et couleur de la guerre qu'autrement, Les Prisonniers

Prizes, with two or three of the captured crew, to be brought before

the Admiral, for the purpose of proceeding to adjudication.

ou pour le moins deux ou trois des plus apparents d'iceux seront amenez à terre, devers nostredit Admiral, ou son Vis-admiral, ou Lieutenant, pour, au plustost que faire se pourra, estre par lui examinez et ouys, avant qu'aucune chose des dits Prises soit descendüe ; afin de savoir le pays delà où ils seront, à qui appartiennent les *navires* et *biens* d'iceux, pour, si la prinse se trouve avoir esté bien faite, telle la declarer, si non, et ou *il se* trouveroit mal faite, la restituer a qui elle appartiendra ; en enjoignant par ces dites presentes audit Admiral, Vis-admiral, ou Lieutenant ainsi le faire. Et sur ce faire et administrer bonne et briefue justice et expedition.

Acts of violence and misdemeanour to be punished by the Admiral.

ART. XXXV.—Si aucuns si trouvent avoir commis faute en leur voyage, soit d'avoir mis a fonds aucun Navires, ou robbé des biens d'iceux, ou noyé les corps des Marchands, Maistres, Conducteurs, et autres Personnes desdits navires, ou *iceux* descendus à terre en aucun loingtaine *coste*, pour celer le larcin et malfait, ou bien quand il adviendroit comme il a fait quelques fois, qu'aucuns d'eux se trouvans les plus forts, viendront à ranconner à argent les navires de nos subjets, ou d'aucuns nos Amis et Alliez : Voulons que sans quelque delay, faveur ou deport, ledit Admiral en face ou face faire justice et punition, telle que ce soit exemples à tous autres, deues informations des cas preallablement faites, et selon qu'il sera cy-après ordonné.

The same subject continued. Plunder, &c. in breach of *usage, toujours et de toute ancienneté observé*, to be punished, &c.

ART. XXXVII.—Et pour ce que souventes fois quand une Prise estoit faite sur nos Ennemis, les Preneurs estoyent si coustumiers de user de leur volontez pour leur profit, qu'ils ne gardoyent *l'usage toujours* et *de toute ancienneté* sur ce ordonné èt observé, mais sans crainte de Justice, comme innobediens et pilleurs, eux estans encores sur mer rompent les coffres, balles, boujettes, malles, tonneaux et autres vaisseaux, pour prendre et piller ce qu'ils peuvent des biens de la prise, *et quoy ceux qui ont equippé et mis sur les navires a gros despens sont grandement foullez*, dont advient souvent de grandes noises débats et contentions. Nous prohibons et deffendons à tous Chefs, Maistres, contre Maitres, Patrons, Quarteniers, Soldats, et Compagnons, de ne faire aucune ouverture des coffres, Balles, &c. ny autres vaisseaux de quelques Prises qu'ils facent, ny aucunes choses desdits Prises receler, transporter, vendre, ny

eschanger, ou autrement alliener, ains ayent a representer le tout desdites Prises, ensemble les Personnes conduisans le navire audit Admiral, ou Vice-Admiral, le plustost que faire se pourra, pour en estre fait et disposé selon qu'il appartiendra, et comme contiennent nos presentes ordonnances, et ce sur peine de confiscation de corps et des biens.

Continued.

ART. XXXVIII.—Quand une Prinse faite et amenée à terre, est trouvée appartenir à nos subjets, Amis et Alliez, et il est ordonne qu'elle sera restituée, l'on ne peut trouver les biens, ny savoir qui les a euz, de sorte que les pauvres Marchands, à qui elle est adjugée ne scavent a qui avoir recours. Nous avons ordonné, que d'oresnavant si aucun rompt coffres, balles, pippes, et autres Marchandises, que nostredit Admiral n'y soit present, ou personne pour lui et par son commandement, il perdra sa part du butin, et sera puni par nostredit Admiral ou son Lieutenant, corporellement selon le meffait, ensorte que tous les autres y prendront exemple.

Distribution of Prize-money, between the *Proprietors*, Victuallers, and Mariners.

ART. XXXIX.—Pour ce aussi que Plusieurs Bourgeois, Proprietaires et Avictuailleurs des Navires nos subjets, nous ont cy-devant fait remonstrer, que jaçoit ce qu'ils facent faire les dits navires, et icelles equipent, et founissent d'artillerie et autres munitions de guerre et de vivres, pour grever et offencer nos Ennemis et Adversaires, le tout à grand frais et despens, neantmoins ne leur est baillé que la Huictiesme pour leur portions de butins qui sont gaignez sur nosdits Ennemis et Adversaires, qui n'est chose suffisante, eu esgard aux grands frais mises et despences qui leur convient faire, à faire faire lesdits navires, et icelles equiper, munir et avictuailler, qui est cause que lesdits Bourgeois, Proprietaires et avictuailleurs, ne peuvent mettre sus, et nos servir de grands et puissans navires, ainsi qu'ils pourroyent faire, si desdits butins raisonable et competente portion leur estoit distribuée. Nous à ce qui d'oresnavant ils ayent plus grande occasion et vouloir de faire faire et entretenir bons, grands, forts, et puissans vaisseaux, dont puisions estre servis et secourus en nos guerres contre nos dits Ennemis et Adversaires, et iceux amplement equiper, munir, et garnir de toutes chose requises pour la guerre, Avons or-

donné et ordonnons qu'iceux Bourgeois et autres ausquels appartierdront aucuns navires, après le dixesme de nostredit Admiral pris et deduit sur la totalitê de la Prise et butin, qui feront lesdits Navires, auront et prendront la quarte partie du surplus d'icelles Prises et butin, soit de marchandises, *prisonniers*, rancons, et quelques que soient les dits Prises et butin, sans aucune chose en reserver n'y excepter ; et de trois quarts restans, les Avictuailleurs en auront quart et demi, et les Mariners, et autres Compagnons de guerre autre quart et demy, pour le partir entre eux en la maniere accoustumée.

Prizes to be brought to the Port from which the capturing Vessel sailed.

ART. XLIII.—Pour obvier à tout desordre et confusion, et à ce qu'à chacun son droit soit gardé, voulons et ordonnons, que les maistres, contremaistres, Governeurs, et autres ayans charge des navires ameinnent les personnes, Navires, Vaisseaux, marchandises et autres biens qu'ils prendront a leur voiage, *au mesme Port et Havre, dont ils seront partis* pour faire le dit voyage, ou au lieu de leur reste, sur peine de perdre tout le droit, qu'ils auront en la dite Prise et butin, et d'amende arbitraire ; le tout à appliquer audit Admiral, à la charge et jurisdiction du quel sera le dit Port dont ils seront partis, et outre de punition corporelle, sinon que par force d'Ennemis, ou par tempeste ils feussent contraints eux sauver en autre Port ; esquels cas seront tenus estans arrivés esdits autres ports et Havres, advertir lesdits officiers de la dite Admiraulté, pour estre presens à l'inventaire desdites marchandises, avant qu'en descharger aucune sur lesdites peines, et en rapporter certificat desdits officiers esdits Havres dont ils seront partis, pour estre delivré ausdits Marchands, Proprietaires et Victuailleurs ; ce qui aura en semblable lieu, pour les Navires qui font voiages hors ce Royaume en marchandises ou autrement.

Pillage, to what extent allowed.

ART. XLV.—Et pour ce que plusieurs Gens de guerre desdits navires voudroyent dire plusieurs biens tenir nature *de pillage*, pour par ce moyen les appliquer à leur profit, au prejudice de ceux qui équipent et arment lesdits Navires, nous avons dit et declaré, dijons et déclarons suivant nos anciennes Ordonnances, que nulle chose pourra estre *dit pillage*, qui excede la valeur de dix escus.

ART. XLVIII.—Avons defendu et defendons sur peine de prison et confiscation de biens, a tous marchans de quelque estat, qualité ou condition qu'il soient, d'acheter, eschanger, permuter, ou prendre par don, ou autre couleur ou condition que ce soit, ne de celer ou occulter par eux ou autres, directment ou indirectment, les marchandises et biens depredez, et amenez de la mer, avant que le dit *Admiral*, ou son dit lieutenant, ait déclaré les Prises *estre justes* et *de bon* et *licite gain*.

Merchants forbidden to purchase Prize Goods before Adjudication by the Admiral.

ART. LXI.—Si aucun Navire de nos subjets pris par nos Ennemis, a esté entre leur mains jusques a vingt-quatre heurs, et aprés il soit recoux et repris par aucune de nos *navires de guerre*, ou *autres de nos subjets*, la prise sera declárée bonne ; mais si la dite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui etoit dedans, et aura toutesfois *le navire de guerre*, qui l'aura recoussé et reprise, le tiers.

Goods recaptured after having been twenty-four hours in the possession of the Enemy, to be good Prize to the re-captor.

ART. LXII.—Et pour autant que en faisant Prinse en mer par nos navires et autres de nos subjets, plusieurs se presentent souvent pour y avoir part, soubs ombre qu'ils veulent alleguer *avoir veu prendre la dite prise*, *et oy l'artillerie durant le combat*, encores qu'ils n'ayent esté l'occasion que l'Ennemy se soit rendu pour crainte d'iceux ; et afin d'eviter et obvier aux differents qui se pourrent mouvoir sur celles injustes demandes ; il ne sera loisible à aucun navire, a qui qu'il soit appartenant, de demander aucune part et portion aux prises qui se feront, si ce n'est qu'ils ayent combatu, ou fait tell effort, que pour son debvoir l'Ennemy ait amené ses voiles, ou bien qu'il en ait esté en quelque partie cause ; *dont les Prisonniers seront creuz par serment ;* si ce n'est qu'il y eust eu promesse entre les uns et les autres, de departir les prises faites en présence ou absence.

Claims of joint-capture confined to cases of actual assistance, and effect produced on the Enemy.

ART. LXIV.—La où aucuns navires à la semonce, qui leur sera faite par les Navires de guerre de *nous* et de nos *subjets*, ameneront libérallement sans aucune resistance leurs voiles et *monsteront leur Chartres parties*, *et recognoisance aus dits Navires de guerre*, il ne leur sera fait aucun tort ; Mais si le capitaine du Navire de guerre, ou ceux de son equipage lui robbent

Vessels submitting to search, and showing their Charter-party, &c. to be protected from injury.

aucune chose, ils seront tenus ensemblement, et l'un seul et pour le tout, à la restitution entiere, et avec ce condamnez reaument et de fait et executez à la *mort et supplice de la rouë*, nonobstant l'appel, pourveu que audit Jugement y assistent six Avocats on Notables personnes de Conseil, qui orront de bouche les prisonniers, et seront tenus signer le dictum.

Resistance by a neutral vessel, cause of confiscation.

ART. LXV.—Pour ce qu'il est à considerer que *ayant* par nous ou autres de nos subjets, *armé un, deux*, ou *plusieurs* navires en guerre pour chercher l'adventure de profiter sur l'Ennemy, l'on ne peut moins faire que discouvrant navire a veue, ou plus prez, que de courir apres pour sçavoir s'il est amy ou ennemy, au moyen de ce que la plus grand part des navires des amis et alliez sont de meme construction, que ceux descits Ennemis, aussi que bien souvent dedans lesdits Navires d'amis et alliez, les Marchandises, qui y sont, appartiennent ausdits Ennemis, ou bien il y a marchandises prohibez: Nous afin d'esclarcir nos gens et subjets, de ce qu'ils auront affaire en ce que dessus, pour n'y faire faute et erreur, dont ils puissent estre reprins; avons permis et permettons, voulons et nous plaist, que tous Navires de guerre de nous et de nos dits subjets, descouvrans à veue ou plus près, autres Navires soyent d'amis, allies ou d'autres, pourront courir apres et les semondre d'amener les voiles, et estans refusans de ce faire apres cette semonce, leur tenir artillerie jusques à les contraindre par force, en quoy faisant venant au combat, par la temerité ou oppiniastreté de ceux qui seront dans les dits Navires, et là dessus estans prins, nous voulons et entendons la dite Prise estre dite et declarée bonne.

Goods of a friend in an Enemy's ship, and ship of a Friend having enemy's goods on board, subject to condemnation.

ART. LXIX.—Et pour ce que par cy-devant soubs coleur des pratiques et intelligences, que ont *aucuns* de nos allies et confederez avec nos Ennemis, lorsqu'il y avoit aucune Prise faite sur mer par nos subjets, plusieurs procés se suscitoyent, par nos dits alliez, voulant dire que les biens, prins en guerre, leur appartiennent, soubs ombre de *quelque part* et *portion qu'ils avoient avec nosdits Ennemis*, dont se sont ensuyies grosses condemnations à l'encontre de nosdits subjets; au moyen de quoi, iceux nos subjets ont depuis craint esquipper as-

vires en guerre, pour nos faire fermer et endommager nos dits Ennemis: Nous pour remedier à telles fraudes, et afin que nos dits subjets réprennent leur courage, et ayent meilleur desir et occasion *d'esquipper* navires en guerre par mer, avons voulu et ordonné, voulons et ordonnons, que si les navires de nos dits *subjets* sont, en temps de guerre, prises par mer d'aucuns Navires appartenans a àutres nos subjets ou à nos alliez, confederez ou amis, esquels y ait biens, marchandises ou gens de nos Ennemis, ou bien aussi Navires de nosdits Ennemis, esquelles y ait personnes, marchandises, ou autres biens de nos dits Subjets, Confederez et Alliez, [in ord. 1543, ou esquels nosdit subjets ou alliez, fussent Personniers en quelques portions,] que le tout soit déclaré de bonne prise—et dès à present comme pour lors, avons ainsi declaré et declarons par ces presentes, comme si le tout appartenoit à nosdits Ennemis. Mais pourront nosdits Alliez et Confederez, faire leur traffic par mer, dedans navires qui soyent de leur obeissance et subjection, et par leur gens et subjets, sans y accueillir nos Ennemis, et Adversaires; les quels biens et Marchandises ainsi chargés, ils pourront mener et conduire où bon leur semblera, pourveu que ce ne soyent munitions de guerre, dont ils vousissent fortifier nosdits Ennemis. Auquel cas, nous avons permis et permettons à nosdits subjets, les prendre, et amener en nos ports et havres, *et les dites munitions retenir, selon l'estimation raisonable, qui en sera faite par nostredit Admiral*, ou son dit Lieutenant.

Art. LXX.—Et pour ce qu'il pourroit advenir, qu'aucuns de nosdits Alliez et Confederez, voudroyent porter plus grande faveur à nosdits Ennemis, et Adversaires, que à nous, et à nosdits subjets, et à ceste cause, voudroyent dire et soustenir *contre* verité, que les Navires prins en mer par nosdits subjets leur appartiendroyent, ensemble la marchandise, pour en frauder nosdits subjets; voulons et ordonnons, qu'incontinent àprès la prise et abordement de navire, nosdits subjets facent diligence de recouvrer la charte partie, et autres lettres concernant la charge du Navire; et incontinent a leur arrivement à terre, les mettre par devers le Lieutenant de nostredit Admiral, afin de cognoistre à qui le navire et marchandises appartiennent; et où

Spoliation of papers for the purpose of concealing the true character of the ship, or goods, causes of confiscation.

ne seroit trouvée charte partie dedans lesdits navirés, *ou* que le maistre et compagnons l'eussent jettée en la mer, pour en celer la verité, voulons que les dits navires ainsi prins, avec les dits biens et marchandises estans dedans, soyent declarez de bonne prise.

Sur la Navigation, Ordonnance du Roi de Suede, 19 Feb. 1715.

Prize Commissions granted not only to Swedes, *but also to Strangers.*

" 1. Le Roi voulant bien permettre, non seulement à ses propres sujets, mais aussi à *ceux des Puissances étrangeres*, d'aller en course sur tous ceux qui contreviendront à ce Reglement ; un chacun qui souhaitera d'avoir une commission d'Armateur, l'obtiendra de Sa Majesté ou de ses Amiraux : mais ceux qui ne seront pas munis d'une telle commission, n'auront point la permission d'aller en course.

Merchant Vessels required to respect and obey the signals of the Privateers, and to submit their Papers to examination.

" 2. Lorsqu'un Armateur fera un signal, ou donnera la chasse à un vaisseau, le maitre sera obligé de lui obéir et de le respecter : de venir à son bord avec ses documens, ou de les envoier par quelqu' autre : En cas que l'Armateur trouve que le vaisseau ou sa charge, ou tous les deux ensemble, soient confiscables, il gardera les documens, après les avoir fait sceller par le proprietaire, et fera aussi sceller les écoutilles du vaisseau avec son Cachet et celui du maître.

The Privateer may also send men on board to inspect, &c.

" 3. Si l'Armateur trouve par les documens que le vaisseau et sa charge ne soient pas de bonne prise, il pourra encore envoier quelqu'un à bord du vaisseau, pour examiner si les documens ne sont point defectueux ; et en cas qu'ils soient trouvez conformes à la verité, il laissera aller le vaisseau sans lui causer aucun dommage.

Merchant vessels endeavouring to *withdraw*,

" 4. Si le vaisseau, à qui on aura fait le signal, tâche de se soustraire, et s'il est ensuite pris par force, le maître sera obligé de donner satisfaction à l'Armateur.

or making the least resistance, subject to condemnation.

" 5. Un vaisseau, qui fera la moindre resistance à un Armateur, perdra par là sa liberté, et sera de bonne prise, quoiqu'il ne l'eût pas été sans cela.

Privateers must deliver up the Papers to the Court, &c.

" 6. L'Armateur ayant faite une prise, devra l'annoncer au Juge du lieu où il l'aura conduite, et lui produira le Protocole

et les documens scellez : Il sera permis, à la requisition de l'Armateur, de faire debarquer le maître et son equipage ; mais le vaisseau et sa charge resteront à la garde dudit Armateur, qui sera obligé de restituer le tout, en cas que l'un et l'autre soient declarez libres.

" 7. Tous les vaisseaux qui seront amènez à *Karelskroon*, ou dans les ports à côté du *Sund*, seront jugez par des personnes établies pour cet effet, et ensuite par des Conseillers de l'Amirauté de *Karelskroon ;* Ceux qui seront conduits à *Gottenbourg* ou aux environs, seront jugez par l'Amirauté de *Gottenbourg ;* et ceux qui seront amenez à *Stralsund* ou dans quelques ports d'Allemagne, seront jugez par l'*Amirauté* de *Stralsund*. Ces jugemens devront se faire sans aucun retardement, et il ne sera pas seulement permis aux maîtres des vaisseaux, d'envoier chercher ailleurs de nouvelles preuves pour leur justification. Mais en cas que l'affaire soit si embrouillée, qu'on ait besoin de plus grands éclaircissemens, on déchargera les effets jusqu'à ce tems là.

Judgment to be speedily rendered.

Where.

In cases of difficulty, if farther inquiry is necessary, the Cargo to be unlivered, &c.

" 8. Tous les vaisseaux apartenant aux ennemis ou à leurs Sujets, seront confiscables, sans avoir égard aux lieux d'ou ils viennent et où ils vont.

Ships of the enemy subject to condemnation.

" 9. De même que tous les vaisseaux neutres qui négocient dans les places de la *Mer Baltique*, enlevées au Roi, y compris les Isles et Havres sur les Côtes de *Finlande*, Ingermelande, Oestlande, Livonie, et Courlande.

Also neutral Ships trading to the prohibited Ports of the Baltic.

" 10. Comme aussi les vaisseaux construits ou achetez dans des places ennemies, et qui n'ont pas encore été dans des endroits libres.

Also Vessels purchased of the Enemy, or built in the Enemy's country, if they have not been into some free port.

" 11. Les documens indispensables dont les maîtres de vaisseaux doivent être munis, sont le contract de la construction du vaisseau, le contract d'achat ou de transport ; et l'Acte de Jaugeage du vaisseau, par ou l'on puisse voir si sa capicité ou grandeur, y mentionnée, se raporte aux contracts de construction et d'achat, comme aussi à la lettre de Mer ou attestation de l'Amirauté, par laquelle on puisse voir le lieu à qui le vaisseau apartient, le nom du capitaine, si les Freteurs ne sont pas ennemis, et où le vaisseau est destiné : le tout devant être attesté

Documents required to be on board.

par serment, tant des capitaines que des Freteurs. Toute la charge devra aussi être spécifiée dans le même passeport, avec le nom du proprietaire, et le seing du magistrat du lieu; et les attestations que les officiers de la Doüane pourroient donner à cet égard, ne seront point valables, quand même les magistrats seroient absens.

Contradictory documents to be taken most unfavourably against the Ship.

" 12. Tous les vaisseaux qui auront des documens *doubles* ou contradictoires, en sorte que selon quelques uns ils soient confiscables, et selon quelques autres libres, seront néanmoins declarez de bonne prise.

Enemies' goods, in whatever Ships, liable to confiscation.

" 13. Tous les effets apartenans à des sujets ennemis, ou envoyez pour leur compte, *seront confiscables, dans quelque vaisseau que ce soit qu'ils soient trouvez.*

Also neutral goods in the ship of an enemy.

" 14. Comme aussi les effets des sujets neutres, qui se trouveront dans des vaisseaux ennemis.

Also all goods from the prohibited ports, Art. 9.

" 15. De même que tous les effets qui vont ou viennent des Havres mentionnez dans l'Article IX.

Also all goods not accompanied with the Proofs required.

" 16. Tous les effets, de quelque valeur qu'ils soient, seront pareillement confiscables, lorsqu'on ne trouvera pas à bord les preuves necessaires; savoir, un certificat attesté des Freteurs par serment, et signé par le Magistrat du lieu, spécifiant en general la charge, à qui elle apartient, et où elle est destinée; comme aussi les Connoissemens, contenant en particulier et par division ladite charge, et pour le compte et risque de qui elle est. Le capitaine sera aussi tenu d'être muni de pareils certificats et documens, pour la portion qu'il pourroit avoir dans la charge, avec la Liste et les marques desdits effets, qui doivent se raporter avec les Connoissemens. Tous les Connoissemens qui ne seront pas entierement remplis, sont tellement defendus, qu'ils rendront le vaisseau confiscable comme aussi divers Connoissemens d'une même sorte de marchandise, ou doubles Connoissemens. Et quoiqu'il soit spécifié dans l'Article XI. quels documens on doit produire pour la franchise du vaisseau et de sa charge; on pourra néanmoins en exiger encore d'autres, comme la chartepartie, Comptes de Facture, *Lettres de Correspondence*, Listes des Doüanes, et autres pareils; après quoi on jugera si le vaisseau est franc ou non.

"17. Les effets qui auront des documens doubles ou contradictoires, seront confiscables comme les vaisseaux, Article XII.

Also all Goods under double Papers.

"18. De même que toutes les marchandises de contrebande, qui peuvent être employées pour la Guerre.

Also all contraband Articles, applicable to purposes of War.

"19. Tous les vaisseaux qui viennent ou vont à une place des ennemis, avec leurs charges, seront tenus pour confiscables.

"20. Les vaisseaux qui s'élpigneront de leur route, seront aussi confiscables, lorsqu'ils ne pourront pas justifier qu'ils y ont été contraints par tempête ou mauvais tems.

Also Vessels found deviating from their destination.

"21. Comme il doit y avoir sur chaque vaisseau un rolle de tout l'equipage, signé par le Magistrat du lieu à qui il apartient, avec le nom du lieu de la naissance de chaque Matelot, et à qui il apartient: Sa Majesté veut qu'il n'y ait fur chaque vaisseau, qu'un quart de Matelots nez dans les Païs ennemis; sous peine d'être confisqué de même que les vaisseaux qui n'auront pas de Rolles ou Listes.

Muster-Roll, how to be verified.—Ships with more than one-fourth of their Crew, born in the Enemy's country, subject to confiscation.

"22. En cas qu'une partie du vaisseau ne soit pas libre, et que l'autre le soit, toutes les parties dudit vaisseau seront confiscables.

Vessels, of which any share is held by an Enemy, subject to Condemnation *in toto*.

"23. Tout ce qui sera déclaré de bonne prise, apartiendra entierement à l'Armateur et à ceux qui auront fait l'Armement, sans qu'on en retienne la moindre chose pour le Roi, ou pour le public."

The whole benefit of Prize, after Condemnation, to belong to the Captor.

*Ordinance of his Majestie the King of Denmark, Norway, the Vandals, and Goths, &c. &c. Dated 23d Sept. 1659.**

We, Friederich the Third, by the Grace of God, King of Denmark, Norway, &c. &c. do hereby make known to all per-

Preamble.

* In 1793, the Danish Government issued the following Proclamation respecting the trade of Danish subjects, in the war which was then just broke out:

"We, by the Grace of God, Christian VII. &c.

"It is only by strictly observing the rules and provisions stipulated for by our Treaties with Foreign Powers, that the merchants of our kingdoms can enjoy the

sons; Whereas in our most gracious declaration, respecting those who trade by sea, bearing date the 30th August last, it is set forth—concerning the certificates for ships, (the sea-briefs,) as well as the certificates for the goods and cargo, on board ships which are destined to Sweden, or to other territories and towns belonging to the Crown of Sweden, or now in possession of the Swedes, as long as this war shall continue: viz. in what form they shall be composed and made out, so as to be deemed sufficient by the Court of Admiralty, and to avail and benefit those persons, that shall produce them in Court. Now to the end that every person may know it, and in a right manner and form furnish ships and goods with certificates; therefore we have most graciously ordered and consented, and do also hereby order and consent, that all and every certificate made, taken out, or granted, for free ships and goods in neutral places, and by neutral persons, shipmasters and owners, as long as *this* war continues, must, in their letter and true meaning, manner, and form, be of the tenor as here follows.

security which our Neutrality has procured for the Danish flag during the present calamities of the war. We therefore order,

"Art. 3. As the principles of Neutrality do not permit any Neutral vessel to enter a port blockaded by any of the Belligerent Powers, or to have Articles on board, considered as Contraband, and destined for States at war, or their subjects, *or, finally, such as already belong to them;* the magistrates must inform the parties concerned of these principles, and be careful that the required oath contains also the engagement to receive nothing on board, which may be comprised in the undermentioned denominations.

"Art. 4. By Contraband is understood, fire-arms and other species of arms, horses, harness, and in general every article necessary for the construction and repair of vessels, with the exception, however, of unwrought iron, beams, boards, and planks of deal and fir.

"Art. 6. In the Treaty of Commerce and Alliance of 1670, with England, it is stipulated that amongst the ship's papers there should be, in time of war, a certificate to prove *that the cargo belongs to a Neutral Power.* In order, therefore, to prevent all cause of dissatisfaction on either side, we have ordered the magistrates in our ports to deliver the certificates required on this subject, and also our consuls in foreign ports; and the former as well as the latter are enjoined to affix their signature to them.

Art. 14. The Certificates respecting the Neutrality of the vessel, as well as the cargo, must be granted under the forms prescribed by the Council of Commerce."

Form of Sea-Briefs and Certificates.

1. The certificate for the ships (which must be made upon oath, and with fingers erect, by every ship-owner, or ship-master, before the Magistrates of his own town or place) must, in its letter and true meaning, be of the tenor as hereunder; and the said certificate must likewise be signed and sealed by the usual sworn Secretary, or Notary; and besides them, as further ordered on this subject, in our aforesaid most gracious declaration.

We, N. N. and N. N., conjuctively, shipmaster, and owner, of the ship N. N. of the burthen of N. lasts, now commanded by Captain N. N. do hereby certify, that the aforesaid ship belongs to no other person, but solely to us, in true right of property, and that no enemy or other person besides ourselves, aforesaid, has any share or interest therein; also, that neither with our conjunctive knowledge and will, or with the knowledge and will of either of us, *shall any goods belonging to enemies be laden therein.* So help us God, and his holy Word!

Enemies' Goods not to be laden on board.

Certificates concerning the neutral property of the Cargo.

2. And that the certificate, which is required to be taken upon oath, and with fingers erect, for every ship's cargo, and goods, and merchandise on board, by every merchant, or freighter, before the Magistrates of his own town or place, must likewise be signed in the manner aforesaid, and must in its letter and true meaning be of the following tenor:*

I, N. N., inhabitant and burgher in N. N., do hereby and by virtue of these presents certify, that all such goods as shall be laden in the ship N. N., whereof N. N. is master, destined to N. N. and which shall be specified in this certificate, with their denominations and marks, do belong to no other person whatever, in this world, besides myself solely and only, and were purchased with my own property or means. Also, that they do solely go for my own account and risk; and this not in appearance only, or for colour sake, so that by means of some clandestine agreement with enemies, I am collusively to cover the said goods by this declaration, as if they were for my own account and risk, until they are brought in safety, and that then they shall belong to, and be sold for account of, enemies; but

That it belongs bona fide to the neutral Merchant.

Without cover or collusion to protect it, *on its Voyage*, and then on its arrival to give it over as belonging to Enemies, or to be sold for them.

that they do bona fide belong to myself, solely, without fraud. So help me God, and his holy Word.

Specification of Goods to be inserted in the Certificate.

And in this certificate there must be inserted a true specification of all the goods, belonging to each certificant, which he has thus caused to be laden, and marked with his proper mark. Inasmuch as such certificates that are of a different tenor, or affirmed to in a manner different from the abovementioned, shall be considered of no value, before our Court of Admiralty, whosoever the Claimant may be, or wherever he may be found with such upon the seas; but they shall be, and remain of no value, even as those certificates are held and considered, which, in a judicial manner, or otherwise, are proved to be false; inasmuch as by and with the advice of our beloved Councellors of State, we have by these presents so enacted it, and have before issued orders concerning the same, in our most gracious declaration.

Certificates of different tenor to be of no more account, or avail, before the Court of Admiralty, than if they were false.

The carrying of contraband Goods prohibited *to* and *from* Swoden.

3. And whereas in our aforesaid most gracious declaration, as well as in all the passports granted by us, it is prohibited to carry, or bring any sorts of contraband goods *to* and *from* Sweden, and the countries and places belonging thereto, or at present possessed by them. Now that every person may know what sort of goods it is which are considered and deemed as contraband, we have on that subject made and given this Specification and Declaration to wit:

Enumeration of Contraband of War carried to Sweden.

1. The following goods will be regarded as contraband, viz. all sorts of ammunition, arms, gunpowder, matches, and saltpetre;—also, saddles, horse-harness, and horses; further, oak ships' timber, and all sorts of ship's materials and apparel, such as sail-cloth, tackling, cordage, and whatever else is considered necessary and useful for carrying on war, besieging, blockading, or other military operations, by land and by sea.

Provisions.

2. The following shall likewise be considered as contraband and prohibited goods, to wit—All sorts of provisions for food and beverage, as well as all sorts of coarse and fine salt, without any distinction whatever, none excepted; save, solely, all sorts of wines, brandy, and spices, (or grocery ware,) and also such quantity of herrings and salt, as are destined to Narva, or

With an exception in favour of particular Goods going to Riga,

Reval, from which places traffic is carried on with the Russian towns and countries; to the end that the trade of Russia may be carried on unmolested; which articles we have graciously, out of a special consideration, consented to have excepted, and to allow that they may be freely conveyed to Narva aforesaid, and the before-named Livonian cities.

or Reval, for the Russian Market.

3. The following goods shall also be reckoned as contraband, viz. calamine, cotton, and whatever else serves for the furtherance of all sorts of manufactures, made, woven, or otherwise put together in Sweden, and the countries and towns under its dominion. Also, such articles as are cast, smith's work, or wire drawn, whether they be of copper, brass, iron, lead, or other materials, or what is made either of metal, linen, or wool, *wheresoever* they are met with, on board of free, or unfree ships, belonging to Swedish subjects. Under this description are to be understood, all sorts of ordnance and cannon, mortars of brass or iron, small or great, all sorts of arms, armour, arms for the use of cavalry or infantry, anchors and anchor-stocks, nails, spikes, and bolts; also all sorts of ready made house furniture and cooper's articles; together with copper and all other coins, being the property of Swedish subjects, and exported from the dominions of Sweden, although they should be found on board of ships belonging to free, or neutral places, and persons, as aforesaid; nevertheless that, on that account, free ships and goods belonging to neutral persons, shall not be subject to confiscation, if with such legal and proper certificates, as above described, they can judicially be proved to be such.

Amongst contraband, also, are to be reckoned other goods going *for* the manufactures of Sweden.
Also goods manufactured in Sweden, coming from Sweden, *in whatever ships;*

but *free* ships and Goods belonging to neutral Merchants, and on board neutral Ships, to go free.

4. But such goods, as, in the before-mentioned manner, are satisfactorily proved to belong to free places and neutral persons, and by them are exported *from* Sweden in *ships of their own*, whether it be *iron in bars*, osmund, (moonworth,) refined copper, (original Gaar-copper,) brass wire, and copper in plates; further, all sorts of grain, and greasy articles, (or fatmongery;) also, hides and skins, and all other Swedish goods, *being raw materials, or not made up or manufactured in Sweden*, or other countries and cities belonging to Sweden—also, flax,

Continuation of such Goods as Neutrals are allowed to export from Sweden, *but* in Ships of *their own.*

Farther Enumeration of Goods allowed to be exported from Sweden.

hemp, wax, fir building timber, deals, laths, Gottland lime and lime-stones, all sorts of flags and other stones, together with masts, spars, tar, pitch, pot and wood ashes, clap-board, pipe-staves, peltry, and other Russia leather, and Russian goods, are not herewith understood or prohibited *to be exported*, (i. e. out of Sweden,) but are hereby permitted and allowed, so that for the sake of maintaining commerce they may be *freely exported* by neutral towns and persons, *in their ships*, by their factors, in the manner aforesaid; and that, on the other hand, they may also freely *import into Sweden* all sorts of silk articles, cloths, and such like fine shop ware, and current goods, which are not properly and directly necessary and useful for any purpose of war; but all such free goods as are found or met with, or overtaken in ships that are not free, shall and must after all (without any exception) be subject to confiscation as good prize. According to which our Admiralty-Council Board, and servants thereof, and all and every our officers, cruizers, and commanders of ships, having commissions, as well as all others, whether they be our friends, neighbours, or enemies, who are carrying on any commerce and traffic by sea, and are minded to continue the same, during the present war, have to conform themselves, and to beware of losses. Given in our Palace at Copenhagen, the 23d of September, in the year 1659, under our seal.

Enumeration of Goods allowed to be imported into Sweden, on the part of neutral Merchants.

But, nevertheless, if in the Ships of the Enemy, subject to Condemnation.

(L. S.) FRIEDERICH.

FROM THE FRENCH ORDINANCE OF 1681.

LIVRE III.—TITRE IX.

§ 2. *Des Prises.*

Art. 3. Défendons à tous nos sujets, de prendre commissions d'aucuns rois, princes ou états étrangers, pour armer des vaisseaux en guerre, et courir la mer sous leur bannière, si ce n'est par notre permission, à peine d'être traités comme pirates.

Prohibition against cruizing under foreign commissions.

4. Seront de bonne prise tous vaisseaux appartenants à nos ennemis, ou commandés par des pirates, forbans ou autres gens courant la mer sans commission d'aucun prince ni état souverain. Vessels of enemies and pirates liable to capture.

5. Tout vaisseau combattant sous autre pavillon que celui de l'état dont il a commission, ou ayant commission de deux différens princes ou états, sera aussi de bonne prise ; et s'il est armé en guerre, les capitaines et officiers seront punis comme pirates. Vessels sailing with double commissions, &c. good prize.

6. Seront encore de bonne prise les vaisseaux avec leur chargement, dans lesquels il ne sera trouvé chartes-parties, connaissemens ni factures. Faisons défenses à tous capitaines, officiers et équipages des vaisseaux preneurs, de les soustraire, à peine de punition corporelle. Also ships without anypepers on board.

7. Tous navires qui se trouveront chargés d'effets appartenants à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise. Ships laden with enemy's property, &c. good prize.

8. Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leurs mains pendant 24 heures, la prise en sera bonne ; et si elle est faite avant les 24 heures, il sera restitué au propriétaire, avec tout ce qui étoit dedans, à la réserve du tiers qui sera donné au navire qui aura fait la recousse. Rule as to recaptures.

9. Si le navire, sans être recous, est abandonné par les ennemis, ou si, par tempête ou autre cas fortuit, il revient en la possession de nos sujets, avant qu'il ait été conduit dans aucun port ennemi, il sera rendu au propriétaire qui le réclamera dans l'an et jour, quoiqu'il ait été plus de 24 heures entre les mains des ennemis. Exception.

10. Les navires et effets de nos sujets ou alliés, repris sur les pirates, et réclamés dans l'an et jour de la déclaration qui en aura été faite en l'amirauté, seront rendus aux propriétaires, en payant le tiers de la valeur du vaisseau et des marchandises, pour frais de recousse. Recaptures from pirates.

11. Les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages qui seront transportés Contraband.

pour le service de nos ennemis, seront confisqués, en quelque vaisseau qu'ils soient trouvés, et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés.

Resistance to visitation and search, damnatory.

12. Tout vaisseau qui refusera d'amener ses voiles, après la semonce qui lui en aura été faite par nos vaisseaux ou ceux de nos sujets armés en guerre, pourra y être contraint par artillerie ou autrement ; et en cas de résistance et de combat, *il* sera de bonne prise.

13. Défendons à tous capitaines de vaisseaux armés en guerre, d'arrêter ceux de nos sujets, amis ou alliés, qui auront amené leurs voiles et représenté leur charte-partie ou police de chargement, et d'y prendre ou souffrir être pris aucune chose, à peine de la vie.

Privilege of asylum of prizes taken by foreign cruizers.

14. Aucuns vaisseaux pris par capitaines ayant commission étrangère, ne pourront demeurer plus de vingtquatre *heures* dans nos ports et havres, s'ils n'y sont retenus par la tempête, ou si la prise n'a été faite sur nos ennemis.

Limitation of this privilege.

15. Si dans les prises amenées dans nos ports par les navires de guerre armés sous commission étrangère, il se trouve des marchandises qui soient à nos sujets ou alliés, celle de nos sujets leur seront rendues, et les autres ne pourront être mises en magasin, ni achetées par aucune personne, sous quelque prétexte que ce puisse être.

Papers of the captured vessel to be seized.

16. Aussitôt que les capitaines des vaisseaux armés en guerre, se seront rendus maîtres de quelques navires, ils se saisiront des congés, passe-ports, lettres de mer, chartes-parties, connaissemens, et de tous autres papiers concernant la charge et destination du vaisseau, ensemble des clés des coffres, armoires et chambres, et feront fermer les écoutilles et autres lieux où il y aura des marchandises.

Prizes to be brought into the port from which the capturing vessel sails.

17. Enjoignons aux capitaines qui auront fait quelque prise, de l'amener ou envoyer, avec les prisonniers, au port où ils auront armé, à peine de perte de leur droit, et d'amende arbitraire, si ce n'est qu'ils fussent forcés par la tempête ou par les ennemis, de relâcher en quelque autre port; auquel cas ils seront tenus d'en donner incessamment avis aux intéressés à l'armement.

18. Faisons défenses, à peine de la vie, à tous chefs, soldats et matelots, de couler à fond les vaisseaux pris, et de descendre les prisonniers en des îles ou côtes éloignées, pour celer la prise.

Papers and prisoners to be brought in, &c.

19. Et où les preneurs ne pouvant se charger du vaisseau pris, ni de l'équipage, enleveraient seulement les marchandises, ou relâcheraient le tout par composition, ils seront tenus de se saisir des papiers, et d'amener, au moins, les deux principaux officiers du vaisseau pris, à peine d'être privés de ce qui leur pourrait appartenir en la prise, même de punition corporelle, s'il y échet.

Captured goods not to be sold before adjudication.

20. Défendons de faire aucune ouverture des coffres, balots, sacs, pipes, barriques, tonneaux et armoires ; de transporter ni vendre aucunes marchandises de la prise, et à toutes personnes d'en acheter ou receler, jusqu'à ce que la prise ait été jugée, ou qu'il ait été ordonné par justice, à peine de restitution du quadruple et de punition corporelle.

Papers of the captured vessel to be delivered up to the Admiralty.

21. Aussitôt que la prise aura été amenée en quelques rades ou ports de notre royaume, le capitaine qui l'aura faite, s'il y est en personne, sinon celui qu'il en aura chargé, sera tenu de faire son rapport aux officiers de l'amirauté, de leur représenter et mettre entre les mains les papiers et prisonniers, et de leur déclarer le jour et l'heure que le vaisseau aura été pris, en quel lieu, ou à quelle hauteur ; si le capitaine a fait refus d'amener les voiles ou de faire voir sa commission ou de faire voir sa commission ou son congé, s'il a attaqué ou s'il s'est défendu, quel pavillon il portait, et les autres circonstances de la prise et de son voyage.

Officers of the Admiralty to take possession of the captured vessel.

22. Après la déclaration reçue, les officiers de l'amirauté se transporteront incessamment sur le vaisseau pris, soit qu'il ait mouillé en rade, ou qu'il soit entré dans le port, dresséront procès-verbal de la quantité et qualité des marchandises, et de l'état auquel ils trouveront les chambres, armoires, écoutilles et fond de celle du vaisseau, qu'ils feront ensuite fermer et sceller du sceau de l'amirauté ; et ils y établiront des gardes pour veiller à la conservation du scellé et pour empêcher le divertissement des effets.

23. Le procès-verbal des officiers de l'amirauté sera fait en présence du capitaine ou maître du vaisseau pris ; et s'il est absent, en la présence de deux principaux officiers ou matelots de son équipage; ensemble du capitaine ou autre officier du vaisseau preneur, et même des réclamateurs s'il s'en présente.

Captured persons to be examined.

24. Les officiers de l'amirauté entendront sur le fait de la prise, le maître ou commandant du vaisseau pris, et les principaux de son équipage, même quelques officiers et matelots du preneur, s'il est besoin.

Captors to be examined, if no papers or prisoners are brought in :— and

25. Si le vaisseau est amené sans prisonniers, chartes-parties ni connaissemens, les officiers, soldats et équipage de celui qui l'aura pris, seront séparément examinés sur les circonstances de la prise, et pourquoi le navire a été amené sans prisonniers : et seront le vaisseau et les marchandises visités par experts, pour connaître, s'il se peut, sur qui la prise aura été faite.

if it does not thereby appear to whom the property belongs, it is to be kept subject to a claim to be made within a year and a day.

26. Si, par la déposition de l'équipage et la visite du vaisseau et des marchandises, on ne peut découvrir sur qui la prise aura été faite, le tout sera inventorié, apprécié, et mis sous bonne et sûre garde, pour être restitué à qui il appartiendra, s'il est réclamé dans l'an et jour, sinon partagé comme épave de mer, également entre nous, l'amiral et les armateurs.

Captured cargo to be delivered, if perishable.

27. S'il est nécessaire, avant le jugement de la prise, de tirer les marchandises du vaisseau, pour en empêcher le dépérissement, il en sera fait inventaire en présence de notre procureur et des parties intéressées, qui le signeront, si elles peuvent signer, pour ensuite être mises sous la garde d'une personne solvable, ou dans des magasins fermant à trois cles differentes, dont l'une sera délivrée aux armateurs, l'autre au receveur de l'amiral, et la troisième aux réclamateurs, si aucun se présente, sinon à notre procureur.

To be sold before adjudication, in case of necessity.

28. Les marchandises qui ne pourront être conservées, seront vendues sur la réquisition des parties intéressées, et adjugées au plus offrant, en présence de notre procureur, à l'issue de l'audience, après trois remises d'enchères, de trois jours en trois jours, les proclamations préalablement faites, et affiches mises en la manière accoutumée.

30. Enjoignons aux officiers de l'amirauté de procéder inces-

ment à l'exécution des arrêts et jugemens qui interviendront sur le fait des prises, et de faire faire incontinent et sans délai, la délivrance des vaisseaux, marchandises et effets dont la main levée sera ordonnée, à peine d'interdiction, de cinq cents livres d'amende, et de tous dépens, dommages et intérêts.

31. Sera prise, avant partage, la somme à laquelle se trouveront monter les frais du déchargement et de la garde du vaisseau et des marchandises, suivant l'état qui en sera arrêté par le lieutenant de l'amirauté, en présence de notre procureur et des intéressés.

Règlement du 17 *Février* 1694, *concernant les passeports accordés aux vaisseaux ennemis par les Puissances neutres.*

Art. 1. On n'aura aucun égard aux passeports des princes neutres, auxquels ceux qui les auront obtenus se trouveront avoir contrevenu, et ces vaisseaux seront considérés comme étant sans aveu. Passports, how invalidated.

2. Un même passeport ne pourra servir que pour un seul voyage.

3. Les passeports seront considérés comme nuls, quand il y aura preuve que le navire pour lequel ils sont expédiés n'était alors dans aucun des ports du prince qui l'a accordé.

4. Tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originairement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte d'actes, et si cette vente ne se trouve à bord, et n'est soutenue d'un pouvoir authentique, donné par le premier propriétaire lorsqu'il ne vend pas lui-même. Sale of ships previously belonging to the enemy, how proved.

5. Les connaissemens trouvés à bord, non signés, seront nuls et regardés, comme des actes informes.

Ordonnance du 12 Mai 1696, touchant la manière de juger les vaisseaux qui échouent, ou qui sont portés aux côtes de France par tempête ou autrement.

Sa Majesté étant informée qu'il est servenu quelques contestations à l'occasion du jugement des vaisseaux échoués, soit à l'égard de ceux qui, étant de fabrique ennemis, ne se sont trouvés munis d'aucun contrat, soit par rapport aux marchandises sans connaissemens, sous prétexte que le règlement du 17 Février 1694 paraît n'avoir été fait que pour les vaisseaux pris, et que l'article de l'ordonnance de 1681, qui confisque les marchandises sans connaissement, est inséré dans le titre des prises ; à quoi sa Majesté désirant pourvoir, en sorte que les vaisseaux marqués, et les marchandises véritablement ennemies, mais souvent réclamées par des sujets des princes neutres, ne puissent être sustraits, en aucun cas, à la juste confiscation établie par les lois de la guerre, et par les ordonnances anciennes et nouvelles ; sa Majesté a ordonné et ordonne que les vaisseaux qui échoueront sur les côtes, et qui seront portés par la tempête ou autrement, seront jugés suivant les articles de l'ordonnance de 1681, insérés dans le titre des prises, et le règlement du 17 Février 1694 ; ce faisant, que tout vaisseau échoué qui sera de fabrique ennemie, ou qui aura eu originairement un propriétaire ennemi, ne pourra être censé neutre, mais sera confisqué en entier au profit de sa Majesté, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer ces sortes d'actes, et si cette vente ne se trouve à bord et n'est accompagnée d'un pouvoir authentique, donné par le premier propriétaire lorsqu'il ne vend pas lui-même. Ordonne pareillement sa Majesté, que les marchandises chargées sur les vaisseaux échoués, dont il ne se trouvera à bord aucun connaissement, seront et demeureront entièrement confisquées à son profit ; n'entend néanmoins sa Majesté, comprendre dans la présente ordonnance, les vaisseaux échoués, dont les papiers se seraient perdus à l'occasion de la tempête et par le malheur du naufrage, en cas que le capitaine ou le commandant en fasse d'abord sa déclaration, et que l'état

du vaisseau, et les circonstances de l'échouement, le puissent faire présumer ainsi; auquel cas, sa Majesté ordonne que les réclamateurs seront seulement tenus de rapporter une nouvelle expédition du contrat d'achat, et le double des connaissemens.

Extrait du Règlement du 21 *Octobre* 1744, *concernant les prises faites sur mer, et la navigation des vaisseaux neutres pendant la guerre.*

Art. 1. Fait sa Majesté défenses aux armateurs François d'arrêter en mer, et d'amener dans les ports de son royaume, les navires appartenant aux sujets des princes neutres, sortis d'un des ports de leur domination, et chargés pour le compte des sujets desdits princes neutres, de marchandises du crû ou fabrique de leur pays, pour les porter en droiture en quelqu'état que ce soit, même en ceux avec qui sa Majesté est en guerre, pourvu néanmoins qu'il n'y ait sur lesdits navires aucunes marchandises de contrebande.

2. Leur fait pareillement défenses d'arrêter les navires appartenant aux sujets des princes neutres, sortis de quelqu'autre Etat que ce soit, même de ceux avec lesquels sa Majesté est en guerre, et chargés, pour le compte desdits sujets des princes neutres, de marchandises qu'ils auront prises dans le pays ou état d'où ils seront partis, pour s'en retourner en droiture dans un des ports de la domination de leur souverain.

Enemy goods not to render the neutral ship, in which they are laden, liable to confiscation.

3. Comme aussi leur fait défenses d'arrêter les navires appartenant aux sujets des princes neutres, partis des ports d'un état neutre ou allié de sa Majesté, pourvu qu'ils ne soient chargés de marchandises du crû ou fabrique de ses ennemis, auquel cas les marchandises seront de bonne prise, et les navires relâchés.

4. Défend pareillement sa Majesté, auxdits armateurs, d'arrêter les navires appartenant aux sujets desdits princes neutres, sortis des ports d'un état allié de sa Majesté, ou neutre, pour aller dans un port d'un état ennemi de sa Majesté, pourvu qu'il n'y ait sur lesdits navires aucunes marchandises de contrebande, ni du crû ou fabrique des ennemis de sa Majesté, dans lequel

cas lesdites marchandises seront de bonne prise, et les navires seront relâchés.

5. Si dans les cas expliqués par les articles 1, 2, 3, et 4 de ce règlement, il se trouvait sur lesdits navires neutres, de quelque nation, qu'ils fussent, des marchandises ou effets appartenant aux ennemis de sa Majesté, les marchandises ou effets seront de bonne prise, quand même elles ne seraient pas de fabrique du pays ennemi, et néanmoins les navires relâchés.

9. Tous connaissemens trouvés à bord, non signés, seront nuls et regardés comme actes informes.

§ 3. *Règlement du 26 Juillet 1778, concernant la navigation des bâtimens neutres en temps de guerre.*

Free ships, free goods, unless bound to a blockaded port, or laden with contraband.

Art. 1. Fait défenses, Sa Majesté, à tous armateurs, d'arrêter et de conduire dans les ports du royaume les navires des puissances neutres, quand même ils sortiraient des ports ennemis, ou qu'ils y seraient destinés, à l'exception toutefois de ceux qui porteraient des secours à des places bloquées, investies ou assiégées. A l'égard des navires des états neutres, qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés, et lesdites marchandises seront saisies et confisquées ; mais les bâtimens et le surplus de leur cargaison seront relâchés, à moins que lesdites marchandises de contrebande ne composent les trois quarts de la valeur du chargement ; auquel cas les navires et la cargaison seront confisqués en entier. Se réservant au surplus sa Majesté, de révoquer la liberté portée au présent article, si les puissances ennemies n'accordent pas le réciproque dans le délai de six mois, à compter du jour de la publication du présent réglement.*

This privilege liable to be revoked in case, &c.

Documents required to prove the proprietary interest.

2. Les maîtres des bâtimens neutres seront tenus de justifier sur mer de leur propriété neutre par les passeports, connaissemens, factures et autres pièces de bord, l'une desquelles au moins constatera la propriété neutre, ou en contiendra une

* The same freedom of commerce not having been granted by Great Britain, this privilege was revoked by France on the 14th of January, 1779, in respect to the United Provinces, except the city of Amsterdam.—See 1 *Code des Prises*, 345.

énonciation précis : et quant aux chartes-parties et autres pièces qui ne seraient pas signées, veut sa Majesté qu'elles soient regardées comme nulles et de nul effet.

3. Tous vaisseaux pris, de quelque nation qu'ils soient, neutres ou alliés, desquels il sera constaté qu'il y a eu des papiers jetés à la mer, ou autrement supprimés ou distraits, seront déclarés de bonne prise avec leurs cargaisons, sur la seule preuve des papiers jetés à la mer, et sans qu'il soit besoin d'examiner quels étaient ces papiers, par qui ils ont été jetés, et s'il en est resté suffisamment à bord pour justifier que le navire et son chargement appartiennent à des amis ou alliés.

Spoliation of papers, damnatory.

4. Un passe-port ou congé ne pourra servir que pour un seul voyage, et sera réputé nul, s'il est prouvé que le bâtiment pour lequel il aurait été expédié n'était, au moment de l'expédition, dans aucun des ports du prince qui l'a accordé.

Passports, invalidated by what circumstances.

5. On n'aura aucun égard aux passe-ports des puissances neutres, lorsque ceux qui les auront obtenus se trouveront y avoir contrevenu, ou lorsque les passe-ports exprimeront un nom be bâtiment différent de l'énonciation qui en sera faite dans les autres pièces be bord, à moins que les preuves du changement de nom avec l'identité du bâtiment, ne fassent partie de ces mêmes pièces, et qu'elles aient été reçues par des officiers publics du lieu du départ, et enregistrées par-devant le principal officier public du lieu.

6. On n'aura pareillement égard aux passe-ports accordés par les puissances neutres, ou alliées, tant aux propriétaires qu'aux maîtres des bâtimens, sujets des états ennemis de sa Majesté, s'ils n'ont été naturalisés ou s'ils n'ont transféré leur domicile dans les états desdites puissances, trois mois avant le premier Septembre de la présente année ; et ne pourront lesdits propriétaires et maîtres de bâtimens, sujets des états ennemis, qui auront obtenu lesdites lettres de neutralité, jouir de leur effet, si depuis qu'elles ont été obtenues, ils sont retournés dans les états ennemis de sa majesté pour y continuer leur commerce.

Subjects of the enemy not entitled to the privileges of naturalization in neutral countries, unless they actually change their domicil, and the native character reverts in case the party returns to reside and carry on trade in his native (enemy) country.

7. Les bâtimens de fabrique ennemie, ou qui auront eu un propriétaire ennemi, ne pourront être réputés neutres ou alliés,

Transfer of ships previously belonging to enemy proprietors, how proved.

s'il n'est trouvé à bord quelques pièces authentiques, passées devant des officiers publics, qui puissent en assurer la date, et qui justifient que la vente ou cession en a été faite à quelqu'un des sujets des puissances alliées ou neutres, avant le commencement des hostilités, et si ledit acte translatif de propriété de l'ennemi, au sujet neutre ou allié, n'a été dûment enregistré par-devant le principal officier du lieu du départ, et signé du propriétaire ou du porteur de ses pouvoirs.

Proofs of proprietary interest in ships previously taken as prize.

8. A l'égard des bâtimens de fabrique ennemie qui auront été pris par les vaisseaux de sa Majesté, ceux de ses alliés ou de ses sujets, pendant la guerre, et qui auront ensuite été vendus aux sujets des états alliés ou neutres, ils ne pourront être réputés de bonne prise s'il ne se trouve à bord des actes en bonne forme, passés par-devant les officiers publics à ce préposés, justificatifs tant de la prise que de la vente ou adjudication qui en aurait été faite ensuite aux sujets desdits états alliés ou neutres, soit en France, soit dans les ports des états alliés ; faute desquelles pièces justificatives tant de la prise que de la vente, lesdits bâtimens seront de bonne prise.

Captured vessel having an enemy supercargo, or more than one third of the crew enemies, &c. presumptive proof of enemy interests.

9. Seront de bonne prise tous bâtimens étrangers sur lesquels il y aura un subrécargue marchand, commis ou officier-major d'un pays ennemi de sa Majesté, ou dont l'équipage sera composé au-delà du tiers de matelots sujets des états ennemis de sa Majesté, ou qui n'auront pas à bord le rôle d'équipage arrêté par les officiers publics des lieux neutres d'où les bâtimens seront partis.

10. N'entend sa Majesté comprendre dans les dispositions du précédent article, les navires dont les capitaines ou les maîtres justifieront, par actes trouvés à bord, qu'ils ont été obligés de prendre les officiers-majors ou matelots, dans les ports où ils auront relâché, pour remplacer ceux du pays neutre qui seront morts dans le cours du voyage.

Farther proof inadmissible.

11. Veut sa Majesté que, dans aucun cas, les pièces qui pourraient être rapportées après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires desdits bâtimens qu'à ceux des marchandises qui pourraient y avoir

été chargées : voulant sa Majesté qu'en toutes occasions, l'on n'ait égard qu'aux seules pièces trouvées à bord.

12. Tous navires des puissances neutres, sortis des ports du royaume, qui n'auront à bord d'autres denrées et marchandises que celles qui y auront été chargées, et qui se trouveront munis de congés de l'amiral de France, ne pourront être arrêtés par les armateurs Français, ni ramenés par eux dans les ports du royaume sous quelque prétexte que ce puisse être.

13. En cas de contravention de la part des armateurs Français aux dispositions du présent règlement, il sera fait mainlevée des bâtimens et des marchandises qui composent leur chargement, autres toutefois que celles sujettes à confiscation, et lesdits armateurs seront condamnés en tels dommages et intérêts qu'il appartiendra.

14. Ordonne sa Majesté que les dispositions du présent règlement auront lieu pour les navires qui auraient échoué sur les côtes dépendant de ses possessions.

15. Veut au surplus sa Majesté, que les dispositions du titre des prises de l'ordonnance de la marine, du mois d'Août, 1681, soient exécutées selon leur forme et teneur, en tout ce à quoi il n'aura pas été dérogé par le présent règlement.

Ord. of 1681, continued in force, except so far as repealed by the present.

DANISH PRIZE INSTRUCTIONS OF 1810.

We, Frederick the sixth, by the Grace of God, King of Denmark and Norway, the Wends and Goths, Duke of Sleswick, Holstein, Stormarn, Ditmarsk, and Oldenburg, make known :

That whereas we find it corresponding with circumstances to renew the acts for privateering from our dominions, which for some time had been stopped, and to establish new regulations, according to which prize cases are to be acted and decided upon, we hereby do publish such rules, recalling our former will of 24th of September, 1807, concerning privateering and the lawful decision of prizes.

Sec. 1. No person or persons within our dominions are per-

mitted to act as privateer without being furnished with a lawful commission for this purpose.

Such commissions are henceforth to be issued out from the Royal Board of Admiralty, and are to be furnished with the seal of the said court. Such commissions to be granted to none but such persons as either by birth or naturalization have acquired the privileges of Danish citizens, or to other ships or vessels but such as carry guns, or the crew of which at least are furnished with weapons.

2. Every ship or vessel that proceeds to sea on privateering, is to be commanded by a person who is skilful in navigation, and who, before he is entrusted with his commission, has signed his name upon oath to these regulations, and promised to obey them, as well as any other orders communicated to him, through our Royal Board of Admiralty.

3. The commissions for privateers are to be to the following purport:

"According to his majesty's most gracious orders, it is hereby made known to all persons concerned, that owner of the ship or vessel burden lasts according to the royal bill, dated the 28th of March, 1810, has obtained permission to fit out the said ship or vessel commanded by in order to cruize against our enemies, (being furnished with guns or other weapons,) for the purpose of capturing, or if necessary, destroying all ships or vessels belonging to the crown of Great Britain, or its subjects, or of stopping and carrying in, in order to be lawfully examined, such ships as are suspected to belong to the said power, or to be connected with it, in a manner incompatible with the laws of neutrality. The owner has deposited the security ordered, and the commander has declared upon his sacred oath to obey the royal orders issued out for privateering, as well as such others as may be given from the Royal Board of Admiralty for this purpose.

The Royal Board of Admiralty, Copenhagen.

Signed and sealed.

4. Petitions to obtain commissions for privateering are to be

sent in to the magistrate of that place whence the ship or vessel destined for privateering is to be fitted out.

He who obtains such a commission ought, as security for such damage as might be occasioned by an illicit use made of the commission, to find bail to the magistrate for a certain sum from 1000 to 15,000 rix dollars. The magistrate in fixing this sum is to take reference to the number of the crew of the ship, so that security, at all events, be given to the amount of 1000 rix dollars, but as to the rest, that the sum of 100 rix dollars is computed for each man on board.

Further are the owners as well as the commander, (the former with the vessel, the latter with his person and property,) responsible for all such damage that may be done to the ship captured.

5. Those privateers to whom lawful commissions have been granted, are allowed to carry the royal Danish pendant and ensign, with our royal cypher in the middle of it, referring ourselves as to the rest, to the regulations ordered in the bill of the 11th of January, 1748.

6. The privateer is bound, as far as it lies in his power, to take and carry in for condemnation all such ships and vessels, as belong to and are proved to be the property of the subjects of the crown of Great Britain.

He is also permitted to bring in for examination every other ship or vessel, the neutrality of which, according to the 10th section of these regulations, is not lawfully proved, or against which grounded suspicions may be formed upon any of the reasons mentioned in the 12th section.

Further—he is authorized to carry in all such ships as may have passed the Sound or the Belt, without paying the duty ordered, and which consequently have no certificate; the penalty (being the double of the duty ordered) to be forfeited to him.

7. No privateer is allowed, (under punishment of losing his commission, or any other punishment according to circumstances,) to stop any ship or make any use of his commission within the territories of a friendly or neutral power, which generally are supposed to reach one league from shore.

With regard to privateering at Oresound, it is to be observed, that the privateers must avoid approaching the Swedish batteries or shore so near that they might be reached by their guns.

8. As we acknowledge as an inevitable rule that free ships constitute free goods, we hereby most positively forbid every cruiser furnished with commission as privateer, to capture any ship belonging to powers that are neutral or in friendly relation with us, (whomsoever the cargo may belong to,) provided the papers regarding the ship or the expedition are in proper order, and the ship has no contraband of war on board, bound to any country belonging to his Britannick majesty, nor be under any of those predicaments mentioned in the 6th sec. as subject to condemnation.

9. As free ship constitutes free cargo, thus, on the other hand, hostile ship constitutes hostile cargo.

10. The ship's papers, which, according to the eighth section, ought to be in proper order, are the following:

The sea passport issued out by the government of that country whereof the ship's owner is a subject, or by a magistrate authorized by such government. Instead of this document, however, any other legal document, proving that the commander, by that government whose real subject he is, mediate or immediate, is authorized to use that neutral flag he sails under on his present voyage, shall be accepted of and credited.

The bill of sale or purchase of the ship, in case he that had the ship built disposed of her to another, then both documents (as well that of her building as that of the purchase) are requisite, provided both circumstances be not mentioned in one and the same document. In case the ship formerly had been captured as prize, as such condemned, then the act of condemnation serves in lieu as well of the document stating where the ship was built as of the bill of purchase; this is however upon a condition that a proper document of the auction held over the ship, or any other proper document proving the lawful disposal of her, is annexed to the act of condemnation.

To ships which, after having been formerly condemned in a foreign state, and to those bought by neutral citizens, proceeding

thence only with ballast home, the act of condemnation, with the document of this auction, or any other document, of her being transferred to another person, ought to be a full substitute in lieu of the other papers ordered, the ship's journal excepted.

Bill of gauge, which must be issued out by the officer appointed to measure ships at the place where the ship is stated to belong to; it must agree with the passport, or, which is instead of it,

The list or roll of the crew properly certified by the respective officers; a full and clear account of all the persons found on board, and not stated in the roll, is also requisite. This list also must prove, that neither the captain, mate, supercargo, factor, commissioner, nor more than one third part of the crew, are British subjects;

The receipt for having paid the duty or custom; this document is also to state where the cargo was shipped, and whither it was bound;

The charter party or bill of lading, or if no charter party was written, then only the bill of lading, which ought to state whither the ship was bound: and, finally,

The ship's journal of the whole voyage mentioned in the passport, with an exception of such ships which only sail from one port in the Baltic to another.

11. As good and lawful prizes are to be considered:

All such ships as evidently belong to the crown of Great Britain, or to subjects of his Britannic majesty, in whatever part of the world they may reside.

Such ships as carry on a smuggling trade to or from Great Britain, or the countries which are under the dominions of the said power, by feigned and forged papers of clearance, as well outward as homeward bound, sail to the abovementioned countries from such places wherein no clearance is allowed, or from these countries to a place where no admittance from thence is allowed.

Such ships as either entirely or partly are loaded with contrabands of war, and which are proved to be bound to harbours in Great Britain, or which have on board officers or privates that

are engaged, or are to be engaged, in the service of the enemy, as well as such ships that might approach a squadron which blockades a Danish city or harbour, or province, in order to trade with the enemy for provisions or refreshments.

Such ships, the crew of which with force oppose the examination of the privateer. In like manner those ships that, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers in war with the same nation, still either in the Atlantic or Baltic, have made use of English convoy.

Such Danish, Norwegian, or, relative to Great Britain, hostile ship, which, after having been captured by the enemy, is re-captured, a third part of the value of the ship and cargo thus re-captured, is due to the captor, whether such ship be taken before or after the expiration of the space of twenty-four hours, the two-thirds to be returned to the owner. If such ships, on the contrary, are re-captured, which as well with regard to us as to the enemy, are neutral, the re-captor is to be paid an equivalent for his danger and trouble according to the decision of the court of justice.

12. As suspected and subject to a further examination may be brought in :

Such ships as are not furnished with the documents mentioned in the tenth section.

Such ships as have double papers or documents, which according to appearance are false.

Such ships, from which papers have been thrown overboard, or by other means destroyed, particularly if this has taken place after the privateer was within sight.

Those ships, the commanders of which have refused to comply with the privateer's request to open such recesses, wherein contraband of war, or documents relating to the expedition of the ship, are suspected to be concealed.

Ships under the above named predicaments are to be treated according to the preceding sections, provided the suspicion against them be not removed by authentic proofs of their neutrality and lawful destination.

13. As contraband of war, (as mentioned in the 11th section,) are to be considered: guns, mortars, and all kinds of weapons, pistols, bombs, grenadoes, balls, firelocks, flint-stones, matches, gun-powder, salt-petre, sulphur, breast plates, swords, bandoliers, cartouches, saddles, and bridles: such articles as the above-mentioned, however, excepted, as are necessary to the defence of the ship and crew.

When the privateer meets a ship that sails under a friendly or neutral flag, he is to hail the commander in order to make him come on board with his ship's documents.

If these are in proper order, he is directly to suffer the ship to proceed on her voyage, without demanding any thing of whatever nature.

If, on the contrary, he finds ground to suspect unfair dealing, he is allowed to go on board the vessel to examine her more thoroughly.

14. During this examination, he must not venture to break open any drawers, chests, trunks, barrels, casks, or any thing else, wherein the cargo may be put up, nor in any wrongful manner investigate into such part of the cargo that may lay scattered about in the ship; but when he has a suspicion of contraband of war or suspicious papers being concealed any where, he is to order the commander to open such recesses which are supposed to contain them, and afterwards again to lock them.

That privateer who acts contrary to these orders, is to pay the damage, forfeit his commission, and besides be punished according to the circumstances.

15. If a privateer brings in a ship, he is forbid, under the same penalty as mentioned in the 14th section, to unload, sell, change, or in any other way to dispose of, or part with, any part of the cargo, but he ought, in concert with the captain, purser, or mate of the ship captured, as far as possible, to seal and lock up the whole of the cargo unopened, (as far as the preservation of the cargo does not require the contrary,) until his arrival at any of those places that are mentioned afterwards.

17. In case of necessity, he is permitted to take victuals and

ammunition out of the ship captured, but he is to give the master of her a list of it, signed by himself.

If the ship carried in afterwards be condemned in his favour, what has been thus taken away is to be deducted from his share; but in case the ship be not condemned, he is to refund in money what has been taken out of the ship.

18. All papers, passports, letters and journals, the *privateer*, after having perused them, shall be obliged to put up and seal, to which the master of the ship adds his. They remain in the possession of the privateer unopened until they may be delivered up to the magistrate of the place where the ship is brought in.

19. The privateer is to proceed to sea from a harbour within our dominions; the prizes he may happen to make during the expedition, are to be carried to such a toll-place in Denmark, Norway, Sleswick, or Holstein, as he may find most *convenient*, or to the nearest place where he may be *protected by military* force, but to no foreign places, at the risk of losing his commission and the sum deposited as security, unless he is forced to do so by stress of weather, for want of provisions, or by being pursued by the enemy; and if this be the case, he shall be bound, (without meanwhile breaking the bulk,) to proceed with the first favourable wind to a custom-place within our dominions.

20. If the cargo, however, consists of goods, which according to their nature easily are spoiled, or the ship through average cannot proceed on her voyage, he is permitted to apply to the magistrate of the place where he enters, in case it be within our dominions, and in foreign countries, to the nearest Danish consul, who are to take such measures as are the most proper for the preservation of the ship and cargo.

21. As soon as the privateer enters into any harbour within our dominions with a prize, he is directly to apply to the judge of the place, who immediately, and at farthest within 24 hours, is to undertake and finish the examination, as well of the privateer and her crew, as of the master of the ship captured, together with the crew and passengers; he is minutely to examine and cross-examine them about the ship's course according to the journal and other circumstances; he is to investigate into the

authenticity of the ship's documents mentioned in the 10th section, the passports of the passengers, their situation on board, voyage and errand, as well as the place where the ship was seized, the conduct of the privateer before, under, and after the capture, and, in short, he is to examine into every thing necessary to the illustration of the case.

22. During the proceeding, it is the duty of the judge in general to consider the interest of both parties in the most careful manner, and before the final decision, summon as well the privateer as in particular the master of the ship captured, to declare whether they wish for any farther illustrations, or have any thing farther to observe, upon which he is to receive and to reflect upon the claims of both parties.

The utmost attention and zeal in this respect are hereby inculcated on all judges, the more so, as, in order to promote the quick expedition and discharge of justice, so necessary in legal proceedings, (and in particular for the ship captured that may expect a release,) we have suffered the parties to meet by proxies before the High Court of Admiralty.

23. The judge, attended by two citizens residing at the place, duly sworn, is to take down a true inventory, and it is to be observed: that this is to be taken of the cargo according to the contents of the ship's documents, and no unloading to take place unless the privateer insists upon it, or the judge has grounded suspicions of unfair dealing which might be discovered by the unshipping, or other circumstances might render it necessary for the preservation of the cargo.

24. This being observed, and the case by the respective judges discussed, so far that sentence at the prize court may be pronounced, the proceedings of the court ought to be taken by the secretary, and to be sent by a speedy messenger to the said court, together with the inventory and the rest of the documents. The judge then informs both parties that the case will be decided upon by the prize court as soon as possible, and that no farther summons before that court will take place.

25. To judge of prize cases in the first instance, we have appointed:

A prize court for the Islands of Zealand, Lolland, Falster, Moen, and neighbouring islands, (the island of Samsoe excepted)—It is held at Copenhagen:

One for the northern parts of Jutland, and the dioceses of Fyon and Samsoe; this is held at Aarhus.

One for the dukedoms of Sleswick and Holstein, held at Flensburgh.

One for each of our provinces of our kingdom of Norway, held in the capital of the respective province.

One for the islands of Bornholm and Christiansoe held at Ronne.

Each of these courts to be constituted of a justitiarius (president) and two assessors, among whom an officer of our navy.

A secretary is appointed at each of these courts.

26. If the prize court finds any further illustrations necessary in a case, the court ought to charge the judge who has held the examination, to procure such as may be wanted.

27. At the making up of the sentence, every circumstance ought most minutely to be considered; no other letters or proofs, however, ought to be taken into consideration, but such as were found on board the ship when she was captured, as it is only left to the High Court of Admiralty to decide how far any of the parties may be allowed to produce farther evidence or proofs.

The final issue of the sentence of the prize court, is to be published in the official journal of the province, by the secretary of the court; the sentence itself, upon the demand of the parties, is immediately to be copied and delivered to them for their farther use.

28. If any of the parties wish to appeal from the sentence of the prize court, he ought to declare such intention, within twenty-four hours after the annunciation of the sentence, to his opponent, and afterwards within the space of eight weeks procure summons from the High Court of Admiralty, which is held in our royal residence, Copenhagen, and give proper warning to the judge and his opponent, agreeably to the bill of April 30th, 1806, containing the instructions for the High Court of Admiralty.

The summons of appeal in Zealand are applied for in the High Court of Admiralty. Out of Zealand, the chief magistrates, and at Bornholm, and at Christiansoe, the governors are authorized to issue out such summons in behalf of the High Court of Admiralty.

When the case is decided by the said court, no further appeal is granted.

29. If a privateer bring in a ship for any other causes than those authorized in this our royal bill, he is not only to defray all the expenses of the case, but moreover to repay all the damage suffered by the ship on account of this seizure.

If, on the contrary, the capture is upon probable cause, the privateer is without any responsibility, though the ship, upon the ground of certain circumstances, is released; in this case, the expenses arising from the case and capture, are to be defrayed out of the ship.

If any of the parties, without any sufficient ground, appeal from the sentence pronounced, he may expect (if his opponent insists upon it) to be sentenced to pay the loss he thereby may have suffered, beside the expenses of the law suit.

30. When any ship captured is condemned in favour of the captor, he is not allowed to dispose of the ship and cargo according to pleasure, but both parts are to be sold generally at the place where the ship is brought in. Out of the amount of the sale, beside the usual salary, one per centum is to be paid to the hospital of invalid sailors at Copenhagen, which sum it is the duty of the judge to receive and transmit to the direction of the said institution, receiving their acquittance.

31. The privateers are exempt from paying the usual duty; no clearance of duty is consequently requisite at their setting out; at their return they need only to announce their arrival at the custom-house, in order that it may be ascertained they import no goods. Out of the goods, on the contrary, which are carried in and condemned, all duties of every denomination are to be paid, similar to other goods imported.

32. The expenses before the court in prize cases we have fixed in a particular bill for this purpose; in the like manner

we have ordered the sum to be paid for commissions of privateering.

33. Every captor of a ship, either hostile or suspected, is to provide for the victualling the crew, from the time of the capture till the sentence of the prize court is pronounced; the expenses to be defrayed out of the ship, when the case is closed.

In the like manner, and upon the same condition, the victualling of the crew of the ship captured, while the case is pending before the High Court of Admiralty, is to be furnished by the captor, provided the sentence of the prize court be appealed from by the captor. The captor, on the contrary, if he has gained the case before the prize court, and appeal is made by the captured, is not bound to feed the crew, unless the master of the ship gives full security for the expenses paid on this account.

34. The magistrate of the place is to receive and deliver up to the nearest fort, such of the crew of a ship captured and condemned, as are subjects of the British crown, where they are considered as prisoners of war; as far as they prove to be subjects of neutral or friendly powers, they are to be delivered up to their respective consuls.

35. We do hereby forbid our magistrates, or other officers to whom we have entrusted the execution of these our orders, or who are employed in the proceedings or decision of prize cases, to partake in any expedition of privateering. Nor must any auctioneer, who is commissioned to sell any ship or cargo condemned, buy them on his own account.

36. A copy of these regulations and instructions for privateers to be on board of every privateer.

These are our will and orders, according to which every one is to conform.

Given at our royal residence of Copenhagen, 10th March, 1810.

Under our royal hand and seal. (L. S.)

KAAS, BULOW,
COLD, MONRAD.
KNUDSEN,

ORDINANCES OF CONGRESS.

Nov. 25, 1775.

1. Resolved, That all such ships of war, frigates, sloops, cutters, and armed vessels, as are, or shall be, employed in the present cruel and unjust war against the United Colonies, and shall fall into the hands of, or be taken by, the inhabitants thereof, be seized and forfeited to and for the purposes hereinafter mentioned. Things liable to capture.

2. Resolved, That all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, or military or naval stores, of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions, or other necessaries, to the British army or armies, or navy, that now are, or shall hereafter be, within any of the United Colonies, or any goods, wares, or merchandize, for the use of such fleet or army, shall be liable to seizure, and, with their cargoes, shall be confiscated. Contraband.

3. That no master or commander of any vessel shall be entitled to cruise for, or make prize of, any vessel or cargo, before he shall have obtained a commission from the Congress, or from such person or persons as shall be for that purpose appointed in some one of the United Colonies. Commissions of Letters of Marque.

4. That it be, and is hereby recommended to the several Legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide, that all trials, in such case, be had by a jury, under such qualifications as to the respective Legislatures shall seem expedient. Courts of prize.

5. That all prosecutions shall be commenced in the Court of that Colony in which the captures shall be made; but if no such Court be at that time erected in the said Colony, or if the capture be made on open sea, then the prosecution shall be in the Court of such Colony as the captor may find most conve- Jurisdiction of the Prize Courts.

nient: provided, that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any Colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbour of the same.

Court of Appeals.

6. That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals; provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of Congress within forty days afterwards; and provided the party appealing shall give security to prosecute the said appeal to effect: and in case of the death of the secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof.

Distribution of Prizes.

7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the United Colonies, then one-third of the prize taken shall be to the use of the captors, and the remaining two-thirds to the use of the said Colony; and where the vessels so employed shall be fitted out at the Continental charge, then one-third shall go to the captors, and the remaining two-thirds to the use of the United Colonies: provided, nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one-half of the value, and the remainder shall go to the Colony or Continent, as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made.

Dec. 5, 1775.

Recaptures and salvage.

Resolved, That in cases of recaptures, the recaptors have, and retain, in lieu of salvage, one-eighth part of the true value of the vessel and cargo, or either of them, if the same hath, or have, been in possession of the enemy twenty-four hours; one-

fifth part, if more than twenty-four and less than forty-eight hours; one-third part, if more than forty-eight and less than ninety-six hours; and one half, if more than ninety-six hours, unless the vessel shall, after the capture, have been legally condemned as a prize by some Court of Admiralty, in which case the recaptors to have the whole; in all which cases, the share detained, or prize, to be divided between the owners of the ship making the recapture, the Colony or the Continent, as the case may be, and the captors, agreeably to a former resolution.

Jan. 6, 1776.

The committee to whom it was referred to consider how the share of prizes allotted to the captors, ought to be divided between the officers and men, brought in their report, which, being taken into consideration, was agreed to as follows:

Distribution of prizes.

Resolved, That the commander in chief have one twentieth part of the said allotted prize money, taken by any ship or ships, armed vessel or vessels, under his orders and command.

That the captain of any single ship or armed vessel have two twentieth parts for his share, but if more ships or armed vessels be in company when a prize is taken, then the two twentieth parts to be divided amongst all the captains.

That the captains of marines, lieutenants of the ships or armed vessels, and masters thereof, share together, and have three twentieth parts divided among them, equally, of all prizes taken when they are in company.

That the lieutenants of marines, surgeons, chaplains, pursers, boatswains, gunners, carpenters, the master's mates, and the secretary of the fleet, share together, and have two twentieth parts and one-half of a twentieth part, divided among them, equally, of all prizes, when they are in company.

That the following petty warrant, and petty officers, viz: (allowing for each ship, six midshipmen; for each brig, four midshipmen; for each sloop, two midshipmen, one captain's clerk, one surgeon's mate, one steward, one sailmaker, one

cooper, one armorer, two boatswain's mates, two gunner's mates, two carpenter's mates, one cook, one cockswain, two sergeants of marines, and one sergeant for each brig and sloop,) have three twentieth parts divided among them, equally; and when a prize is taken by any ship or vessel, on board, or in company of which the commander in chief is, then the commander in chief's cook or cockswain to be added to this allotment, and have their shares with those last mentioned.

That the remaining eight twentieth parts, and one half of the twentieth part, be divided among the rest of the ship or ships companies, as it may happen, share and share alike.

That no officer or man have any share, but such as are actually on board their several vessels when any prize or prizes are taken, excepting only such as may have been ordered on board any other prizes before taken, or sent away by his or their commanding officers.

March 23, 1776.

Resolved, That the inhabitants of these colonies be permitted to fit out armed vessels to cruise on the enemies of these United Colonies.

April 2, 1776.

The committee appointed to prepare the form of a commission and instructions to commanders of private ships of war, brought in the same, which were read.

The commission being agreed to, is as follows:

Form of commission for private armed vessels.

The delegates of the United Colonies of New Hampshire, &c. to all whom these presents shall come, greeting: Know ye, that we have granted, and by these presents do grant, license and authority to ——, mariner, commander of the ——, called the ——, of the burthen of —— tons, or thereabouts, belonging to ——, of ——, in the Colony of ——, mounting —— carriage guns, and navigated by —— men, to fit out and set forth the said ——, in a warlike manner, and by and with the said

—— and crew thereof, by force to attack, seize, and take the ships, and other vessels, belonging to the inhabitants of Great Britain, or any of them, with their tackle, apparel, furniture, and lading, on the high seas, or between high and low-water marks, and to bring the same to some convenient ports in the said Colonies, in order that the Courts, which are or shall be there appointed to hear and determine causes civil and maritime, may proceed in due form to condemn the said captures, if they be adjudged lawful prize; the said —— having given bond, with sufficient sureties, that nothing be done by the said ——, or any of the officers, mariners, or company thereof, contrary to, or inconsistent with, the usages and custom of nations, and the instructions, a copy of which is herewith delivered to him. And we will, and require, all our officers whatsoever, to give succour and assistance to the said —— in the premises. This commission shall continue in force until the Congress shall issue orders to the contrary.

By order of Congress.

Attest, ——. ——, President.

April 3, 1776.

Commissions for private armed vessels to be sent, &c.

Resolved, That blank commissions, for private ships of war, and letters of marque and reprisal, signed by the president, be sent to the general assemblies, conventions, and councils or committees of safety, of the United Colonies, to be by them filled and delivered up to the persons intending to fit out such private ships of war, for making captures of British vessels and cargoes, who shall apply for the same, and execute the bonds which shall be sent with the said commissions, which bonds shall be returned to the Congress.

Applications for commissions, how to be made.

Resolved, That every person intending to set forth and fit out a private ship or vessel of war, and applying for a commission, or letter of marque and reprisal for that purpose, shall produce a writing subscribed by him, containing the name and tonnage, or burthen of the ship or vessel, the number of her guns, with their weight of metal, the name and place of residence of

the owner or owners, the name of the commander and other officers, the number of the crew, and the quantity of provisions and warlike stores; which writing shall be delivered to the Secretary of Congress, or to the Clerk of the House of Representatives, convention, or council, or committee of safety, of the colony in which the ship or vessel shall be, to be transmitted to the said secretary, and shall be registered by him, and that the commander of the ship or vessel, before the commission or letters of marque and reprisal shall be granted, shall, together with sureties, seal and deliver a bond, in the penalty of five thousand dollars, if the vessel be of one hundred tons or under, or ten thousand dollars, if of greater burthen, payable to the President of the Congress, in trust, for the use of the United Colonies, with conditions of the words following, to wit:

Bond to be given.

Form of bond.

"The condition of this obligation is such; that if the above bounden ——, who is commander of the —— called ——, belonging to ——, of ——, in the colony of ——, mounting —— carriage guns, and navigated by —— men, and who hath applied for a commission, and letters of marque and reprisal, to arm, equip, and set forth the said ——, as a private ship of war, and to make captures of British vessels and cargoes, shall not exceed or transgress the powers and authorities which shall be contained in the said commission, but shall, in all things, observe and conduct himself, and govern his crew, by and according to the same, and certain instructions therewith to be delivered, and such other instructions as may hereafter be given to him; and shall make reparation for all damages sustained by any misconduct or unwarrantable proceedings of himself, or the officers or crew of the said ——, then this obligation shall be void, or else remain in force:" which bond shall be lodged with the said Secretary of Congress.

November 15, 1776.

Congress took into consideration the report of the committee relative to the navy: whereupon,

Resolved, That a bounty of twenty dollars be paid to the commanders, officers, and men, of such continental ships or vessels of war as shall make prize of any British ships or vessels of war, for every cannon mounted on board each prize at the time of such capture, and eight dollars per head for every man then on board, and belonging to such prize.

Bounty for guns captured, and head money.

Tuesday, May 2, 1780.

The board of admiralty having reported the form of a commission for private vessels of war, and of the bond to be given by the master and commander of the said private armed vessels, and instructions to the said masters; the same were taken into consideration and agreed to, as follows:

The form of a Commission.

[L. S.] The Congress of the United States of America, to all to whom these presents shall come, send greeting:

Form of commission to private armed vessels.

KNOW YE, That we have granted, and by these presents do grant, license and authority to ——, mariner, commander of the ——, called the ——, of the burthen of —— tons, or thereabouts, belonging to ——, mounting —— carriage guns, and navigated by —— men, to fit out and set forth the said —— in a warlike manner, and by and with the said ——, and the officers and crew thereof, by force of arms, to attack, subdue, seize, and take all ships and other vessels, goods, wares, and merchandises, belonging to the crown of Great Britain, or any of the subjects thereof, except the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships or vessels bringing persons with intent to settle within any of the said United States, which ships or vessels shall be suffered to pass unmolested, the masters thereof permitting a peaceable search, and giving satisfactory information of their lading and their destination; or any other ships or vessels, goods, wares, or merchandises, to whomsoever belonging, which are or shall be declared to be subjects of cap-

ture by any resolutions of Congress, or which are so deemed by the Law of Nations: and the said ships and vessels, goods, wares, and merchandises, so apprehended as aforesaid, and as prize taken, to bring into port, in order that proceedings may be had concerning such capture in due form of law, and as to right and justice appertaineth: and we request all kings, princes, states and potentates, being in friendship or alliance with the said United States, and others to whom it shall appertain, to give the said —— all aid, assistance, and succour, in their ports, with his said vessel, company, and prizes, we, in the name and on behalf of the good people of the said United States, engaging to do the like to all the subjects of such kings, princes, states and potentates, who shall come into any ports within the said United States. And we will and require all our officers whatsoever, to give to the said —— all necessary aid, succour, and assistance in the premises. This commission shall continue in force during the pleasure of the Congress, and no longer.

In testimony whereof, we have caused the seal of the Admiralty of the United States to be affixed hereunto. Witness, his Excellency ——, Esquire, President of the Congress of the United States of America, at ——, this —— day of ——, in the year of our Lord one thousand seven hundred and ——, and in the —— year of our independence.

Passed the Admiralty Office.

Attest, ——, Secretary of the Board of Admiralty.

The Form of the Bond.

Form of Bond. Know all men by these presents, that we, ——, are held and firmly bound to A. B. Esquire, treasurer of the United States of America, in the penalty of twenty thousand Spanish milled dollars, or other money equivalent thereto, to be paid to the said A. B., treasurer as aforesaid, or to his successors in that office. To which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the —— day of ——, in the year of

our Lord ——, and in the —— year of the Independence of the United States.

The condition of this obligation is such, that whereas the above bounden ——, master and commander of the ——, called the ——, belonging to ——, mounting —— carriage guns, and navigated by —— men, and who hath applied for and received a commission, bearing date with these presents, licensing and authorizing him to fit out and set forth the said —— in a warlike manner; and by and with the said ——, and the officers and crew thereof, by force of arms, to attack, subdue, seize, and take all ships and other vessels, goods, wares, and merchandize, belonging to the crown of Great Britain, or any of the subjects thereof; (excepting the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships or vessels bringing persons with intent to settle within the said United States;) and any other ships or vessels, goods, wares, and merchandize, to whomsoever belonging, which are or shall be declared to be subjects of capture by any resolutions of Congress, or which are so deemed by the law of nations. If, therefore, the said —— shall not exceed or transgress the powers and authorities given and granted to him in and by the said commission, or which are or shall be given and granted to him by any resolutions, acts, or instructions of Congress, but shall, in all things, govern and conduct himself as master and commander of the said ——, and the officers and crew belonging to the same, by, and according to the said commission, resolutions, acts, and instructions, and any treaties subsisting, or which may subsist between the United States of America and any prince, power, or potentate whatever: and shall not violate the law of nations or the rights of neutral powers, or of any of their subjects, and shall make reparation for all damages sustained by any misconduct or unwarrantable proceedings of himself or the officers or crew of the said ——, then this obligation to be void, otherwise to remain in full force.

Signed, sealed, and delivered, }
in the presence of us, }

Instructions to the captains and commanders of private armed vessels, which shall have commissions or letters of marque and reprisal.

Instructions to private armed vessels.

1. You may, by force of arms, attack, subdue, and take all ships and other vessels belonging to the crown of Great Britain, or any of the subjects thereof, on the high seas, or between high water and low water marks, (except the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships and vessels bringing persons with intent to settle and reside within the United States, which you shall suffer to pass unmolested, the commanders thereof permitting a peaceable search and giving satisfactory information of the contents of the lading, and destination of the voyages.) And you may also annoy the enemy by all the means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations or the laws of neutrality.

2. You are to pay a sacred regard to the rights of neutral powers, and the usage and custom of civilized nations, and on no pretence whatever presume to take or seize any ships or vessels belonging to the subjects of princes or powers in alliance with these United States, except they are employed in carrying contraband goods or soldiers to our enemies; and in such case you are to conform to the stipulations contained in the treaties subsisting between such princes or powers and these states; and you are not to capture, seize, or plunder any ships or vessels of our enemies, being under the protection of neutral coasts, nations, or princes, under the pains and penalties expressed in a proclamation issued by Congress the 9th day of May, Anno Domini 1778.

3. You shall bring such ships and vessels as you shall take, with their guns, rigging, tackle, apparel, furniture, and lading, to some convenient port or ports, that proceedings may thereupon be had in due form of law concerning such captures.

4. You shall send the master, or pilot, and one or more prin-

cipal person or persons of the company of every ship or vessel by you taken in such ship or vessel, as soon after the capture as may be, to be by the judge or judges of such court as aforesaid examined upon oath, and make answer to such interrogatories as may be propounded touching the interest or property of the ship, or vessels, and her lading; and, at the same time, you shall deliver, or cause to be delivered, to the judge or judges, all passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings found on board, proving the said papers by the affidavit of yourself, or of some other person present at the capture, to be produced as they were received, without fraud, addition, subduction, or embezzlement.

5. You shall keep and preserve every ship or vessel, and cargo, by you taken, until they shall, by sentence of a court properly authorized, be adjudged lawful prize, or acquitted, not selling, spoiling, wasting, or diminishing the same, or breaking the bulk thereof, nor suffering any such thing to be done.

6. If you, or any of your officers or crew, shall, in cold blood, kill or maim, or by torture or otherwise, cruelly, inhumanly, and contrary to common usage, and the practice of civilized nations in war, treat any person or persons surprised in the ship or vessel you shall take, the offender shall be severely punished.

7. You shall, by all convenient opportunities, send to the Board of Admiralty, written accounts of the captures you shall make, with the number and names of the captives, and intelligence of what may occur, or be discovered concerning the designs of the enemy, and the destinations, motions, and operations of their fleets and armies.

8. One-third, at least, of your whole company, shall be landsmen.

9. You shall not ransom or discharge any prisoners or captives, but you are to take the utmost care to bring them into port; and if, from any necessity, you shall be obliged to dismiss any prisoners at sea, you shall, on your return from your cruise, make report thereof on oath to the judge of the admiralty of the state to which you belong, or in which you arrive, within

twenty days after your arrival, with your reasons for such dismission. And you are to deliver, at your expense, or the expense of your owners, the prisoners you shall bring into port, to a commissary of prisoners nearest the place of their landing, or into the nearest county jail.

10. You shall observe all such farther instructions as Congress shall hereafter give in the premises, when you shall have notice thereof.

11. If you shall do any thing contrary to these instructions, or to others hereafter to be given, or willingly suffer such thing to be done, you shall not only forfeit your commission, and be liable to an action for breach of the condition of your bond, but be responsible to the party grieved for damages sustained by such malversation.

Resolved, That the Board of Admiralty be empowered, and directed to cause to be printed, so many copies of said forms as they shall judge necessary.

Resolved, That the President transmit to the Governors or Presidents of the respective States, so many copies of the said forms as the Board of Admiralty shall advise, and at the same time inform them, that it is the intention of Congress, that all commissions and instructions now in force, be cancelled as soon as possible, and commissions, bonds, and instructions of the new form, be substituted in place thereof.

The motion of Mr. Madison was again taken into consideration, and thereupon the following Ordinance was passed:

An Ordinance relative to the capture and condemnation of Prizes.

The United States in Congress assembled, taking into consideration the implacable war waged against them by the king of Great Britain, and judging it inconsistent with their dignity, as a free and independent nation, any longer to continue indulgencies and exemptions to any of the subjects of their enemy, who is obstinately bent upon their destruction or subjugation, have thought it proper to ordain and order, and it is hereby ordained and ordered, that henceforward general reprisals be

granted against the ships, goods, and subjects of the king of Great Britain; so that, as well the fleets and ships of these United States, as also all other ships and vessels commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled, shall, and may lawfully seize all ships, vessels, and goods, belonging to the king or crown of Great Britain, or to his subjects, or others inhabiting within any of the territories or possessions of the aforesaid king of Great Britain, and bring them to judgment in any of the Courts of Admiralty that now are, or hereafter may be, established in any of these United States, by the authority of the United States in Congress assembled; and the said Courts of Admiralty are hereby authorised and required, to take cognizance of, and judicially to proceed upon, all, and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are, or shall be taken, and to hear and determine the same, and, according to the course of Admiralty, and the laws of nations, to adjudge and condemn all such ships, vessels, and goods, as shall belong to the king of Great Britain, or to his subjects, or to any others inhabiting within any of the countries, territories, or dominions, or possessions, of the aforesaid king of Great Britain.

Enemy's ships or goods liable to capture.

And that the Board of Admiralty, or secretary of marine, forthwith prepare, and lay before the United States in Congress assembled, a draught of instructions, for such ships or vessels as shall be commissionated for the purposes above-mentioned.

And it is hereby further ordained, that the destruction of papers, or the possession of double papers, by any captured vessel, shall be deemed and taken as just cause for the condemnation of such captured vessel; and that, when any prize, having been taken and possessed by the enemy twenty-four hours, shall be retaken from them, the whole of such recaptured prize shall be condemned for the use of the recaptors; but in cases where the prize shall have continued in the possession of the enemy less than twenty-four hours, it shall be restored to the original owner or owners, except one third part of the

Spoliation of papers damnatory.

Recaptures and salvage.

true value thereof, which shall be allowed as salvage to the recaptors.

Trading with the enemy.

And it is hereby further ordained, that the citizens and inhabitants of these United States be, and they hereby are, strictly enjoined and required to abstain from all intercourse, correspondence, or dealings whatsoever, with the subjects of the said king of Great Britain, while at open war with these United States, as they will answer the same at their peril; and the executives of the several States are hereby called upon to take the most vigilant and effectual measures for detecting and suppressing such intercourse, correspondence, or dealings, and bringing the authors thereof, or those concerned therein, to condign punishment.

And in order the more effectually to remove every colourable pretence for continuing such intercourse, it is hereby ordained, that from and after the first day of November next, no benefit shall be claimed from, nor countenance or regard paid to, any letters of passport or safe conduct, heretofore granted by the Congress of the United States, to any of the citizens or inhabitants thereof, or to any person or persons whatever, for the removal of their property or effects from places within the dominions or possessions of the said king of Great Britain:

. Provided always, that this ordinance shall not extend to authorise the capture or condemnation of any vessel belonging to any inhabitant of Bermudas, which being loaded with salt only, may arrive in any of these United States, on or before the first day of May next.

And it is hereby ordained, that all former acts or resolutions of Congress, contrary to the tenor, true intent, and meaning of this ordinance, be, and they are hereby repealed.

Saturday, April 7th, 1781.

On a report of a committee, consisting of Mr. Varnum, Mr. Bee, and Mr. Van Dyke, to whom was referred the draught of

instructions to the captains of private armed vessels, reported by the Board of Admiralty :*

Be it ordained, and it is hereby ordained, by the United States in Congress assembled, that the following instructions be observed by the captains or commanders of private armed vessels, commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled. Instructions to private armed vessels.

First. You may by force of arms, attack, subdue, and seize all ships, vessels, and goods, belonging to the king or crown of Great Britain, or to his subjects, or others inhabiting within any of the territories or possessions of the aforesaid king of Great Britain, on the high seas, or between high water and low water marks. And you may also annoy the enemy by all means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations, or laws of neutrality. Enemy ships, and enemy goods therein, liable to capture.

Second. You are to pay a sacred regard to the rights of neutral powers, and the usage and customs of civilized nations; and on no pretence whatever, presume to take or seize any ships or vessels belonging to the subjects of princes or powers in alliance with these United States; except they are employed in carrying contraband goods or soldiers to our enemies; and in such case you are to conform to the stipulations contained in the treaties subsisting between such princes or powers and these States; and you are not to capture, seize, or plunder any ships or vessels of our enemies, being under the protection of neutral coasts, nations, or princes, under the pains and penalties expressed in a proclamation issued by the Congress of the United States, the ninth day of May, in the year of our Lord one thousand seven hundred and seventy-eight. Free ships, free goods, except contraband.

Third. You shall permit all neutral vessels freely to navigate

* This Ordinance was passed by Congress in consequence of the temporary recognition, by the United States and France, of the principles of the armed neutrality, as laid down in the declaration of her Majesty, the Empress of Russia, of February 26th, 1780. 2 *Dall.* 18. See, also, Darby *et al.* v. The Brig Estern, *Ib.* 34.

on the high seas, or coasts of America, except such as are employed in carrying contraband goods or soldiers to the enemies of these United States.

Definition of contraband.

Fourth. You shall not seize or capture any effects belonging to the subjects of the belligerent powers on board neutral vessels, excepting contraband goods; and you are carefully to observe, that the term contraband, is confined to those articles which are expressly declared to be such in the treaty of amity and commerce, of the sixth day of February, one thousand seven hundred and seventy-eight, between these United States and his most Christian Majesty, namely, arms, great guns, bombs, with their fuses, and other things belonging to them, cannon balls, gun powder, matches, pikes, swords, lances, spears, halberts, mortars, petards, grenadoes, salt petre, muskets, musket balls, bucklers, helmets, breastplates, coats of mail, and the like kind of arms proper for arming soldiers, musket rests, belts, horses, with their furniture, and all other warlike instruments whatever.

Prizes to be adjudged in Courts of captor's country, or those of its ally.

Fifth. You shall bring all such ships and vessels as you shall seize or capture, with their guns, rigging, tackle, apparel, and furniture, and ladings, to judgment, in any of the Courts of Admiralty that now are, or hereafter may be, established in any of these United States, in any Court authorised by his most Christian Majesty, or any other power in alliance with these United States, to take cognizance of captures and seizures made by the private armed vessels of these States, and to judicially hear and determine thereon.

Prize proceedings.

Sixth. You shall send the master or pilot, and one or more principal person of the company, of every ship or vessel by you taken, in such ship or vessel, as soon after the capture as may be, to be by the judge or judges of such Court as aforesaid, examined upon oath, and make answer to such interrogatories as may be pronounced, touching the interest or property of the ship or vessel and her lading; and at the same time you shall deliver, or cause to be delivered, to the judge or judges, all passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings found on board, pro-

ving the said papers by the affidavit of yourself, or of some other person present at the capture, to be produced as they were received, without fraud, addition, subduction, or embezzlement.

Seventh. You shall keep and preserve every ship or vessel, and cargo, by you taken, until they shall, by sentence of a Court properly authorized, be adjudged lawful prize, or acquitted; not selling, spoiling, wasting, or diminishing the same, or breaking the bulk thereof, nor suffering any such thing to be done.

Eighth. If any of your officers or crew shall, in cold blood, kill or maim, or by torture, or otherwise, cruelly, inhumanly, and contrary to common usage, and the practice of civilized nations in war, treat any person or persons surprised in the ship or vessel you shall take, the offender shall be severely punished.

Ninth. You shall, by all convenient opportunities, send to the Board of Admiralty, or secretary of marine, written accounts of the captures you shall make, with the numbers and names of the captives, and intelligence of what may occur, or be discovered, concerning the designs of the enemy, and the destinations, motions, and operations of their fleets and armies.

Tenth. One third at least of your whole company shall be landsmen.

Eleventh. You shall not ransom or discharge any prisoners or captives, but you are to take the utmost care to bring them into port; and if, from necessity, you shall be obliged to dismiss any prisoners at sea, you shall, on your return from your cruise, make report thereof, on oath, to the judge of the Admiralty of the State to which you belong, or in which you arrive, within twenty days after your arrival, with your reasons for such dismission; and you are to deliver at your expense, or at the expense of your owners, the prisoners you shall bring into port, to a commissary of prisoners nearest the place of their landing, or into the nearest county jail.

Twelfth. You shall observe all such further instructions as

shall hereafter be given by the United States in Congress assembled, when you shall have notice thereof.

Thirteenth. If you shall do any thing contrary to these instructions, or to others hereafter to be given, or willingly suffer such thing to be done, you shall not only forfeit your commission, and be liable to an action for breach of the condition of your bond, but be responsible to the party grieved, for damages sustained by such malversation.

Ordered, that the Board of Admiralty report, as soon as may be, proper regulations for the conducting and governing the vessels of war of the United States, and other armed vessels.

An Ordinance, ascertaining what captures on water shall be lawful.

In pursuance of the powers delegated by the confederation in cases of capture on water:

What captures lawful.

Be it ordained, by the United States in Congress assembled, that from and after the first day of February next, all resolutions and ordinances of Congress relating to captures or recaptures on water, and coming within the purview of this ordinance, except as is hereinafter excepted, shall be null and void; but questions of this nature arising before, or which shall be undetermined at that day, shall be determined at any time during the war with Great Britain, according to them, in the same manner as if this ordinance had never been made.

It shall be lawful to capture, and to obtain condemnation of the property hereinafter enumerated, if found below high-water mark; that is to say,

Enemy's vessels.

All ships and other vessels, of whatsoever size or denomination, belonging to an enemy of the United States, with their rigging, tackle, apparel, and furniture.

Enemy's goods found on board an enemy's ship.

All goods, wares, and merchandises belonging to an enemy, and found on board of a ship or other vessel of such enemy.

Contraband goods in neutral vessels. All other goods in such vessels, free.

All contraband goods, wares, and merchandises, to whatever nation belonging, although found in a neutral bottom, if destined for the use of an enemy; but the goods, wares, and mer-

chandises belonging to an enemy, contraband goods, and goods destined to a blockaded, invested, or beseiged port, being always excepted, found in a vessel belonging to a foreign nation, other than an enemy, shall, in no case, be subject to condemnation:

Provided, nevertheless, that from and after the first day of March, in the year one thousand seven hundred and eighty-two, all goods, wares, and merchandises, of the growth, produce, or manufacture of Great Britain, or of any territory depending thereon, if found within three leagues of the coasts, and destined to any port or place of the United States, in any ship or vessel belonging to the citizens of the said States, or the subjects of any neutral power, shall be liable to capture and condemnation, unless the same shall have been previously captured from the enemy and condemned, or in consequence of capture, may be proceeding to some port or place not in the power of the said enemy, for trial and condemnation.

All ships or other vessels, goods, wares, and merchandises, belonging to any power, or the subjects of any power against which letters of marque or reprisal shall have issued.

Ships and cargoes bound to a blockaded port.

All ships or other vessels, with their rigging, tackle, apparel, and furniture, and with their cargoes, to whatsoever nation belonging, destined to any port or place, invested, beseiged, or blockaded, by a sufficient force belonging to, in the service of, or co-operating with the United States, so effectually as that one cannot attempt to enter into such port or place without evident danger.

Definition of blockade.

Goods of pirates.

All ships or other vessels, with their rigging, tackle, apparel, and furniture, and with their cargoes, found in the possession of pirates.

Definition of contraband.

The goods, wares, and merchandises, to be adjudged contraband, are the following, that is to say: cannons, mortars, firearms, pistols, bombs, grenadoes, bullets, balls, fuses, flints, matches, powder, saltpetre, sulphur, carcasses, pikes, swords, belts, pouches, cartouch-boxes, saddles and bridles, in any quantity beyond what may be necessary for the ship's provision, and may properly appertain to, and be adjudged necessary

for, every man of the ship's crew, or for each passenger. If it shall manifestly appear, that of any entire thing of which division cannot be made without injury to its value, a subject of the enemy, and a citizen or a subject of a foreign power, not being an enemy, are joint holders, the whole shall be condemned and sold for gold or silver, the proper proportion of the net proceeds of which shall be deposited in the treasury of the State in which the sale shall be, to be paid to the order of such citizen, or the subject of such foreign power.

If such division can be accomplished, but neither the citizen, nor the subject of a foreign power, nor his agent, shall require specific restitution of his property, there shall be a sale in the same manner as if the property were indivisible. But if, in such case, a requisition be made to this effect, the due proportion shall be specifically restored.

Recaptures and salvage.

Where property shall have been originally captured on land from a State, or a citizen of the United States, and shall be recaptured below high water mark by another citizen thereof, restitution shall be made to the former owner, upon the payment of a reasonable salvage, not exceeding one-fourth part of the value; no regard being had to the time of possession by the enemy.

In all cases of recapture by an armed vessel, fitted out at the expense of the United States, of a vessel, or other effects, belonging to a citizen, the Court shall adjudge the proportion which would be due to the United States, to be remitted to such citizen, no regard being had to the time of possession by the enemy.

On the recapture by a citizen, of any negro, mulatto, Indian, or other person, from whom labour or service is lawfully claimed by a State, or a citizen of a State, specific restitution shall be adjudged to the claimant, whether the original capture shall have been made on land or water, and without regard to the time of possession by the enemy, a reasonable salvage being paid by the claimant to the recaptor, not exceeding one-fourth of the value of such labour or service, to be estimated

according to the laws of the State under which the claim shall be made.

But if the service of such negro, mulatto, Indian, or other person captured below high water mark, shall not be legally claimed within a year and a day from the sentence of the Court, he shall be set at liberty.

In all other cases of recapture, restitution shall be made to the owner, upon payment of one-third part of the true value for salvage, if the property shall have been retaken in less than twenty-four hours after the capture. But if it shall not have been retaken until the expiration of twenty-four hours after the capture, restitution shall not be made of any part.

Captures by non-commissioned captors.

Besides those who are duly authorized to make captures by special commission, captures of the property of an enemy shall be adjudged lawful when made:

1st. By a private vessel not having such commission, satisfactory proof being produced that they were made in pursuing the course of her voyage, and repelling a previous attack from an enemy.

2d. By any body or detachment of regular soldiers.

3d. By inhabitants of the country, if made within cannon shot of the shore.

4th. By an armed vessel sailing under a commission of his most Christian Majesty.

5th. By the crews of British vessels, while captures of this sort are licensed by the British.

Recaptures shall be made by no other persons than those authorized to make captures, except the crews of vessels retaken.

Spoliation of papers, damnatory.

The destruction of papers, or the possession of double papers by any captured vessel, shall be considered as evidence for condemnation, unless good cause be shown to the contrary.

From and after the first day of February, which shall be in the year of our Lord one thousand seven hundred and eighty-two, any letters of passport or safe conduct, granted before the 27th of March last, under the authority of Congress, to any

person whatsoever, for removal of property from a place beyond sea within the dominions or possessions of the British king, shall be void.

Distribution of prizes.

Upon the capture of a vessel commissioned as a man of war or privateer, by any of the vessels of war of the United States of America, the whole of the property condemned shall be adjudged to the captors, to be divided in the following manner, (saving to all persons who shall lose a limb in any engagement, or shall be otherwise disabled in the service of the United States, every benefit accruing to them under the resolutions of Congress of the 26th day of November, one thousand seven hundred and seventy-five,) that is to say:

To the commander in chief of the navy of the United States, shall be allotted one twentieth part of all prizes taken by an armed vessel or vessels under his orders and command; when there shall be no such commander in chief, the one twentieth part allotted to him shall be paid into the treasury of the United States.

To the captain of any single armed vessel, two twentieth parts; but if more ships or vessels be in company when a prize is taken, then the two twentieth parts shall be divided equally among all the captains.

To the captains of marines, lieutenants, and masters, three twentieth parts of all prizes taken when they are in company, to be divided equally among them.

To the lieutenants of marines, surgeons, chaplains, pursers, boatswains, gunners, carpenters, master's mates, and the secretary of the fleet, two twentieth parts, and one half of one twentieth part, to be divided equally among them.

To the following petty warrant officers, viz: midshipmen, (allowing for each ship six, for each brig four, and for each sloop two,) captain's clerks, surgeon's mates, stewards, sailmakers, cooper's, armourers, (allowing for each vessel one of each only,) boatswain's mates, gunner's mates, carpenter's mates, (allowing for each vessel two of each,) cooks, cockswains, (allowing for each vessel one of each,) serjeants of marines, (allowing two for each ship, and one for each brig and

sloop,) three twentieth parts, to be divided equally among them: and when a prize is taken by any vessel, on board, or in company of which the commander in chief is, then the commander in chief's cook, or cockswain, shall be added to the petty warrant officers, and share equally with them.

The remaining eight twentieth parts, and half of the one twentieth part, shall be divided among the rest of the vessels' company or companies, as it may happen, share and share alike.

No officer nor man shall have any share but such as are actually on board their several vessels when any prize or prizes shall be taken, excepting only such as may have been ordered on board any other prizes, before taken, or sent away by his or their commanding officers.

Upon the captureof any vessel, if made by a vessel of war belonging to the United States, one half of the property condemned shall be decreed to the United States, and the other half to the captors, to be divided as aforesaid; if by a private vessel not having a commission, the whole shall be decreed to the captors; if by any body, or detachment of regular or other troops in the service of the United States, the whole shall be adjudged to the captors, to be divided in proportion to the pay in the line of the army; if by inhabitants of the country, being in arms, the whole shall be adjudged to the captors, to be divided equally among them: provided, that if any such inhabitant shall be wounded in making the capture, he shall be entitled to two shares, and if killed, his legal representatives shall be entitled to four shares; if by the crews of British vessels, the whole shall be adjudged to the captors, to be divided at the discretion of the Court.

On recapture by an armed vessel belonging to the United States, of a vessel under the protection of a vessel belonging to the enemy, commissioned as a man of war or privateer, or where the vessel retaken is equipped in a warlike manner, the proportion to be withdrawn from the original owner shall be divided, as in the case of a capture of an enemy's vessel commissioned as a man of war or privateer.

On recapture, by an armed vessel belonging to the United States, of a vessel under the protection of a hostile vessel not commissioned as a man of war or privateer; and where the vessel retaken is not equipped in a warlike manner, the proportion to be withdrawn from the original owner shall be divided, as in the case of a hostile vessel not commissioned as a man of war or privateer.

Rules of decision in prize causes.

The rules of decision in the several Courts shall be the resolutions and ordinances of the United States in Congress assembled, public treaties, when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials.

This ordinance shall commence in force on the first day of February, which will be in the year of our Lord one thousand seven hundred and eighty-two.

Done by the United States in Congress assembled, &c. &c.

Tuesday, January 8th, 1782.

The ordinance for amending the ordinance, ascertaining what captures on water shall be lawful, was read a third time and passed, as follows:

An Ordinance for amending the Ordinance, ascertaining what captures on water shall be lawful.

Joint captures.

Whereas there hath been great variance in the decisions of several Maritime courts within the United States, concerning the pretensions of vessels claiming a share of prizes, as being in sight at the time of capture: some having adjudged that the mere circumstance of being in sight was a sufficient foundation of title, while others have required proof of a more active influence: and whereas, this inconvenience hath arisen from the want of an uniform rule of determination in such cases:

Be it therefore ordained, by the United States in Congress assembled, that no share of any prize shall be adjudged to a

vessel being in sight at the time of capture, unless the said vessel shall have been able at the time when the captured vessel struck, to throw a shot as far as the space between herself and the captured vessel; and that every vessel coming in aid of the captors, which shall have been able at the time when the captured vessel struck, to throw a shot as aforesaid, and shall have been duly authorized to make captures, shall be entitled to share according to the number of her men and the weight of her metal: provided, that nothing herein contained shall be construed to affect any agreement which shall have previously been made between vessels cruising in concert.

And be it further ordained by the authority aforesaid, that whensoever an armed vessel belonging to, and commissioned by the enemy, shall be captured by any armed vessel belonging to the United States, and duly authorized to make captures, the net proceeds of the sales of the captured vessel, and of her rigging, tackle, apparel, and furniture, shall be adjudged to the captors; and where a cargo shall be on board of such captured vessel, one moiety of the net proceeds of such cargo shall be adjudged to the United States, and the other moiety to the captors.

And be it further ordained by the authority aforesaid, that upon the capture of any vessel belonging to the enemy, and laden with masts or spars, by an armed vessel belonging to the United States, and duly authorized to make captures, the net proceeds of the sales of such captured vessel, and her cargo, shall be adjudged to the captors.

This ordinance shall take effect, and be in force, from and after the last day of February next.

Done by the United States in Congress assembled, &c. &c.

Tuesday, February 26th, 1782.

The following ordinance being read a third time, was agreed to:

An Ordinance for further amending the Ordinance, ascertaining what captures on water shall be lawful.

Whereas divers ships or vessels belonging to the citizens of several of these United States, may have sailed on voyages to Europe, before the publication of the ordinance, entitled, "An Ordinance ascertaining what captures on water shall be lawful," where they, as well as vessels belonging to the subjects of neutral powers, may have laden and taken on board, in promiscuous cargoes, goods, wares, and merchandises, of the growth, product, or manufacture of Great Britain, or of some of the dominions or territories thereon depending, without any knowledge of the said ordinance, and may not be able to arrive in any of the ports of these States, on or before the first day of March next, whereby the said goods may become liable to capture and condemnation:

For remedy whereof, it is hereby ordained by the United States in Congress assembled, that no ship or other vessel, which shall have sailed from any port or place in Europe, not belonging to the king of Great Britain, on or before the tenth day of April next, for any port or place within the United States, not in possession of the enemy, shall be liable to capture or molestation, merely for having on board goods, wares, or other merchandises, of the growth, product, or manufacture of Great Britain, or of any territory depending thereon.

And it is hereby further ordained, that where vessels, their cargoes, or any part thereof, belonging to any citizen of these United States, sailing, or being within the body of a county, or within any river or arm of the sea, or within cannon shot of the shore of any of these States, and laden with the produce of the country, and destined for a port or place within these States, not in possession of the enemy, shall be captured by the enemy, and shall be recaptured below high water mark by another citizen thereof, restitution shall be made to the former owner, upon the payment of a reasonable salvage, not exceeding one

fourth part of the value, no regard being had to the time of possession of the enemy.

And be it further ordained, that so much of the aforesaid ordinance as comes within the purview of this, be, and hereby is repealed.

Done by the United States in Congress assembled, &c. &c.

An Ordinance for the better distribution of prizes in certain cases.

Distribution of prizes.

Be it ordained by the United States in Congress assembled, that so much of the ordinance, entitled, "An Ordinance ascertaining what captures on water shall be lawful," as ordains that upon the capture of a vessel commissioned as a man of war, or a privateer, by any of the vessels of war of the United States of America, the whole of the property condemned shall be adjudged to the captors, be, and the same is hereby repealed; and that, in all such cases of capture, the whole of the property condemned shall be adjudged to the use of the captors, if the vessel taken shall be of equal or superior force to the vessel making the capture; if otherwise, one half only shall be adjudged to the captors, and the other half to the use of the United States, and shall, after condemnation, be so appropriated, unless the United States in Congress assembled, in reward of distinguished valour and exertion, shall otherwise specially direct.

Bounty for guns, &c. captured, repealed.

And be it further ordained by the authority aforesaid, that the resolution of the 15th day of November, 1776, giving to the commanders, officers, and men of the ships or vessels of war, a bounty for every cannon, and for every man belonging to British ships or vessels of war captured by them, be, and the same is hereby repealed.

Done by the United States in Congress assembled, &c. &c.

BRITISH STATUTES AND PRIZE INSTRUCTIONS.

Commissions, how to issue.

With regard to the issuing of letters of marque, the lord high admiral of Great Britain, or the commissioners appointed

for executing that office, or any three of such commissioners, or any persons by them empowered or appointed, shall, at the request of any duly qualified owner or owners of any ship or vessel duly registered, according to the directions of the acts passed in the 26th and 34th years of Geo. 3.* (provided such owner or owners give the bail or security hereafter specified,) cause to be issued in the usual manner, one or more commissions, or letters of marque and reprisal, to any person or persons nominated by such owner to be commander, or (in case of death, successively) commanders, of such ship or vessel; for the attacking, surprising, seizing, and taking, by and with such vessel, or with the crew thereof, any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods or merchandise, belonging to, or possessed by, any of his Majesty's enemies, in any sea, creek, haven, or river.†

All persons applying for such commissions, or letters of marque, must make their application in writing, *subscribed with their hands*, to the high admiral, or other persons thus empowered, or to the lieutenant or judge of the high Court of Admiralty, or to his surrogate, and such application must set forth "a particular, true, and exact description of the ship or vessel for which such commission, or letter of marque and reprisal, is requested, specifying the name and burthen of such ship or vessel, what sort of built she is, and the number and nature of the guns, and what other warlike furniture and ammunition are on board the same, to what place the ship belongs, and the name or names of the principal owner or owners of such ship or vessel, and the number of men intended to be put on board the same.‡

* 26 Geo. 3. c. 60. 34 G. 3. c. 68.

† 13 G. 2. c. 4. sect. 2. 33 G. 3. c. 66. sect. 9. 43 G. 3. c. 160. sect. 7.

‡ By the 13 Geo. 2. c. 3. privateers (*and also trading vessels*) are allowed to man their ships with *foreign seamen*, provided they do not exceed three-fourths of the ship's company. This statute also confers all the privileges of British subjects upon such seamen after two years service during war; excepting that no one can be a member of the privy council, or of parliament, hold any office or place of trust, or have any grant of lands, tenements, or hereditaments from the crown, *either to himself, or any person or persons in trust for him.* The duration of this act is unlimited; though several temporary statutes (28 Geo. 2. c. 16. 19 Geo. 3. c. 14. 33 Geo. 3. c. 26.) have subsequently allowed the same privileges during war. A late statute, however, requires *three* years service.

(all which particulars must be inserted in every commission, or letters of marque,) for what time they are victualled;" and "also the names of the commanders and officers."*

Farther, every commander of a private ship or vessel of war, for which such commission or letters of marque shall be granted, must produce the same to the collector, customer, or searcher, for the time being, of his Majesty's customs, residing at, or belonging to the port, whence such ship shall be first fitted out, or to their lawful deputies. And such collector, customer, &c. shall, *without fee or reward, and as early as may be*, inspect and examine the said vessel, in order to ascertain her built and burthen, the number of men, together with the number and nature of the guns on board. If, after examination, such vessel appear to be of such built and burthen, and to be manned and armed according to the tenor of the description inserted in the commission or letter of marque; or if she be of greater force or burthen than is therein specified; in such case, the collector, &c. or his or their deputies, shall, immediately, upon the request of the commander of such ship or vessel, give him, *gratis*, a certificate thereof in writing, under his or their hand or hands: and such certificate shall be deemed a necessary clearance before the vessel or letter of marque, thus commissioned, shall be permitted to sail from that port.† The same statute likewise declares, that in case any commander proceed out of port upon a cruize, without such certificate of clearance, or with a force inferior to that specified in the commission or letter of marque, the latter shall be *absolutely* null and void; the commander thus offending shall be subject to the penalty of 1000*l.* recoverable with full costs of suit by any person, and shall also be

* 33 Geo. 3. c. 66. s. 15. 43 Geo. 3. c. 160. s. 13. *Instructions for Letters of Marque, &c. against the goods of the French and Batavian Republics.* Art. 6. Previously to taking out letters of marque, the owners of all the vessels, for which such letters shall be granted, must nominate and register in the Court a proctor, exercent in the Court of Appeal, in case any appeal should be instituted from the decisions of the Court below. 41 Geo. 3. c. 96. s. 10.

† 33 Geo. 3. c. 66. s. 15. 43 Geo. 3. c. 160. s. 13.

imprisoned for such space of time as the court shall direct, not exceeding one year for any one offence.*

Bail to be given on the issuing of commissions.

Previously, however, to obtaining letters of marque, bail must be given with sureties, before the lieutenant and judge of the high Court of Admiralty, or his surrogate, in the sum of three thousand pounds sterling, if the ship carry more than one hundred and fifty men; and if she carry a less number, in the sum of fifteen hundred pounds sterling.† Farther, such sureties must, prior to their being bound, severally make oath before the judge of the said Court of Admiralty *of England*, or judge of any other Court of Admiralty in any other of his Majesty's dominions, or his or their surrogates, that they are respectively worth more than the sum for which they are to be bound, over and above all their just debts. And in order to prevent frauds, the marshal of the Admiralty Court is enjoined to make diligent inquiry into the sufficiency of such bail and security; and to make his report accordingly to the judge or his surrogate, before any commission or letter of marque can be granted.‡

Judges, advocates, and proctors, in the Courts of Admiralty, not to be concerned in privateers.

No judge of any Vice-admiralty Court, established in the West Indian or American colonies, can, either directly or indirectly, have any share or interest whatever, in any privateer or letter of marque.§ Nor can any judge, advocate, marshal, proctor, or any other officer of any Admiralty or Vice-admiralty Court, either in England, or in the colonies, possess any such interest, on pain of forfeiting his employment, and also the sum of five hundred pounds to the use of his Majesty; being convicted of every such offence in any Court of Record in Great Britain, or at any general session of the peace in any of the American colonies. And all advocates or proctors, thus offending, are for ever disqualified and incapacitated from practising their profession.

Commissions, how revocable.

Letters of marque are revocable, either by violating the

* 33 Geo. 3. c. 66. s. 15. 43 Geo. 3. c. 160. s. 13.

† "Instructions for letters of marque," &c. Art. 15.

‡ 43 Geo. 3. c. 160. s. 12.

§ 41 Geo. 3. c. 96. s. 17.

revenue laws, or by the lord high admiral. In the former case, if the owner or owners, commander, master, or other persons having the command of the letter of marque, or privateer, be guilty of any offence contrary to any acts now in force, or which may hereafter be enacted, for the protection of the customs or excise, or for the prevention of smuggling, such persons shall forfeit their commission, independently of the other penalties or forfeitures incurred by reason of such offence.*

Where, however, the lord high admiral, or any three or more of the commissioners for executing that office, may deem it expedient to revoke any letters of marque, by any order or orders in writing, under his or their hand or hands, the secretary of the admiralty is required to transmit, as early as possible after such revocation, a notice in writing to the owner or owners of the vessel named or described in such order, or to his or their agent or agents, surety or sureties, or some or one of them. In case the ship be in the Channel, the order of revocation shall be effectual to supersede and annul the commission or letter of marque, at the expiration of twenty days after such notice has been given, or sooner if the notice be actually given in writing by the secretary of the admiralty to the captain or commander of such vessel. If she be in the North Seas, the commission becomes void at the end of thirty days. Six weeks are allowed before the order takes effect, in case the ship be to the south of Cape Finisterre, or in the Mediterranean; three months, if she be in North America or the West Indies; and if in the East Indies, six months, after such notice is given. Complaint of such revocation may be made to his Majesty in council by any commander, owner, agent, or surety, within thirty days after notice of revocation has been given by the secretary of the admiralty. His Majesty's determination in council, respecting such complaint, is final; but in case the order of revocation be superseded, the commission or letter of marque shall be deemed to have continued in force; and all prizes taken by virtue thereof shall belong to the owners and

* 33 Geo. 3. c. 66. s. 19. 43 Geo. 3. c. 160. s. 18.

captors, in the same manner as if no such order of revocation had been made. But no person is liable (before he shall have received personal notice of such order) to be punished for doing any lawful matter or thing, which he might have done under the authority of his commission or letter of marque, in case such order of revocation had not been made.*

Forgery of commission.

If any person or persons counterfeit, erase, alter, or falsify any commission for war, or letter of marque, or any warrant for making out the same, or any certificate required by law to be obtained, or shall publish or make use of any such commission, warrant, or certificate, knowing the same to be counterfeited, erased, altered, or falsified, such person or persons incur a forfeiture of five hundred pounds, recoverable with full costs of suit, in any court of record in Great Britain.† And if any of these offences be committed out of this realm, they may be alleged to be committed, and may be laid, inquired of, tried, and determined in any county in England, in the same manner, to all intents and purposes, as if such offences had been done or committed within the body of such county.‡

What colours privateers may hoist.

No commander of any ship or vessel, having letters of marque, is allowed, at his peril, to wear any jack, pennant, or other ensign or colours, usually borne by king's ships; but, beside the colours in general hoisted by merchant's ships, he must wear a red jack, with the union jack described in the canton, at the upper corner thereof, near the staff.§

Things liable to capture, &c.

The commanders of privateers, or merchant ships, having letters of marque and reprisals, are authorized to set upon by force of arms, subdue, and take, the men of war, ships, and vessels, goods, wares, and merchandises, belonging to the enemy, or to any subjects of, or persons inhabiting within his territories;‖ but in such a manner, that no hostilities be committed, nor prize attacked, seized, or taken, within the harbours

* 33 Geo. 3. c. 66. s. 20. 43 Geo. 3. c. 160. s. 17.
† Ibid. s. 48. 43 Geo. 3. c. 160. s. 48.
‡ Ibid. s. 49. 43 Geo. 3. c. 160. s. 49.
§ "Instructions for letters of marque," &c. Art. 8.
‖ "Instructions," &c. Art. 1.

of princes and states in amity with us, or in their rivers or roads within shot of their cannon, unless by permission of such princes or states, or of their commanders or governors in chief in such places.

If any ship or vessel be taken as prize, none of the officers, mariners, or other persons on board her, shall be stripped of their cloaths, or in any sort pillaged, beaten, or evil-intreated, on pain of the offender's being liable to such punishment as a Court Martial shall think proper to inflict.* Pillage and ransoms forbidden.

No commanders of privateers, or letters of marque, are allowed to ransom, or agree to ransom, quit or set at liberty, any ship or vessel, or their cargoes, which shall be seized and taken, on pain of forfeiting their commission, *unless in cases of extreme necessity, to be allowed by the Court of Admiralty*, and incurring such penalties of fine and imprisonment, as the Court shall adjudge.† Nor are they permitted, on any pretence whatever, to ransom any prisoners; but they must transmit an account of, and deliver over, such prisoners as they may take on board of any prizes, to the commissioners appointed for exchanging prisoners of war, or to the persons appointed in seaport towns to take charge of prisoners; and such prisoners are subject only to the orders, regulations, and directions of the said commissioners.‡ Farther, it is unlawful for any of his Majesty's subjects to ransom, or to enter into any contract for ransoming any ship belonging to British subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his subjects.§ And if any contracts be entered into, or any bills, notes, or other securities be given for that purpose, they are absolutely null and void; beside which, the party thus offending incurs a forfeiture of 500*l.* which may be sued for by any person.‖ Ransoms from the enemy prohibited.

* 22 Geo. 2. c. 33. stat. 2. s. 9. otherwise called the ninth article of war.

† "Instructions," Art. 9.

‡ Ibid. Art. 10. 33 Geo. 3. c. 68. s. 36. 43 Geo. 3. c. 160. s. 35.

§ 22 Geo. 3. c. 25. s. 1. 33 Geo. 3. c. 66. s. 37. 43 Geo. 3. 8. c. 166. s. 36.

‖ 21 and 22 Geo. 3. c. 54. (*for Ireland.*) 22 Geo. 3. c. 25. ss. 2, 3. 33 Geo. 3. c. 69. ss. 38, 39. 43 Geo. 3. c. 160. ss. 37, 38.

Collusive captures.

If any ship or vessel, or any goods or merchandises, be taken or retaken and restored, by any privateer, through consent or clandestinely, or by collusion or connivance, without being brought to adjudication, such ship or vessel, together with the goods and merchandises, and also the ship's tackle, apparel, furniture, arms, and ammunition, shall, on proof thereof, to be made in any Court of Admiralty, be declared and adjudged a good prize to his Majesty. One moiety of the prize is to go to his Majesty's use, and the other moiety to the person who may sue for the same; beside which, the bond given by the captain of such privateer is forfeited to his Majesty. Farther, if such collusive capture, or recapture and restoration, be made by any captain or commander of any king's ships, the vessel thus taken, or retaken and restored, is not only to be condemned as a prize to his Majesty, but also the offenders are disqualified and incapacitated from serving him for seven years, and incur a forfeiture of 1000*l.* recoverable by any person who may sue for the same; and who is entitled to one half of the penalty, while the other moiety goes to the use of his Majesty.*

Prizes, where to be carried.

All prizes must be conducted either into an English port, or into some other port of the British dominions, as may be most convenient, in order that they may be legally adjudged in the high Court of Admiralty in England, or before the judges of any other Admiralty Court in the British dominions.† All the effects found on board, of whatever description, must be preserved, without any part of them being taken out, spoiled, wasted, embezzled, or diminished, and without breaking bulk, (unless it shall be necessary for the better securing thereof, or for the necessary use and service of any of his Majesty's ships of war,) until judgment has been given in the high Court of Admiralty, or in some other lawfully authorized Court of Admiralty, that the ship, goods, and merchandises are lawful prize.‡ Persons offending in these respects, not only forfeit

* 13 Geo. 2. c. 4. s. 19. 43 Geo. 3. c. 160. s. 42.

† Instructions, Art. 2.

‡ Instructions, Art. 3. 22 Geo. 2. c. 36. stat. 2. s. 8. otherwise called the 8th article of war.

the whole of their respective shares of the captures to the use of the Royal Hospital at Greenwich, but also incur a fine treble the value of the article or articles so embezzled, one third part of which goes to the same noble institution, and the remainder to any person that may sue for the same ;* and if the offender be on board one of his Majesty's ships of war, he is liable to suffer such farther punishment as a Court Martial or the Court of Admiralty shall impose.†

In order to prevent any of these abuses, the commissioners for taking examinations in prize causes are, by their regulations, required first to make an entry of the time of the captured vessel's arrival in port; after which they must give directions to the collector of the customs or naval officer at such port, or any other proper person, to see that the prize be duly and safely moored in sufficient depth of water, or on soft ground, so that the ship may receive no damage. The person attending to this business, receives the sum of *one guinea* from the captor, who must also pay all lights and port charges incurred on account of the prize.‡ Two of these commissioners, accompanied by the collector of the customs or naval officer of the port, then proceed on board the ship, to examine whether bulk has been broken, in which case they are enjoined to certify the same to the judge of the high Court of Admiralty: next, they seal the hatches and chests of merchandise, which are on no account to be opened or unloaded by any persons whomsoever, unless by special order under seal of the Court, excepting only in cases of fire and tempest, and of absolute necessity.§

* 13 Geo. 2. c. 4. s. 9. 33 Geo. 3. c. 66. s. 46. 43 Geo. 3. c. 160. s. 45.

† 22 Geo. 2. c. 33. stat. 2. s. 8.

‡ "Regulations for the Observance of Prize Commissioners," in Sir James Marriott's "*Formulare Instrumentorum*," p. 380. &c. Art. 1 and 2.

§ "Regulations," &c. Art. 3. By an order of the Court of Admiralty, dated January 6, 1782, only two commissioners are allowed to be employed for taking the examinations for one ship with one actuary, and so on by rotation. And with regard to interpreters, in cases of neutral vessels, if the master of the captured neutral ship object that the interpreter does not understand the language, in such case the proper persons are directed to be sent up to London, in order that they

Papers and prisoners to be sent in.

After the captor has conducted his prize into port, he, or one of the chief officers, or some other person present at the capture, must bring or send as early as possible, three or four of the principal of the company (of whom the master and mate or supercargo, must always be two) of every such prize, before the judge of the high Court of Admiralty, or his surrogate, or before the judge of any other lawfully authorized *Admiralty* Court within the British dominions, or such persons as shall be legally commissioned in that behalf, in order that they may be sworn and examined upon such interrogatories* as shall tend to the discovery of the truth, concerning the interest or property of such ship or ships, vessel or vessels, and of the goods, merchandises, or other effects found therein. Farther, the captor is obliged, at the time he produces the company to be examined,† and before any monition shall be issued, to bring and deliver into the hands of the said judge of the high Court of Admiralty of England, his surrogates, or the judge of such other Admiralty Court, lawfully authorized within the British domi-

may be examined by the officer in Doctors' Commons, at the request of the master. Marriott's "Formulare," pp. 15, 16.

* In the examination of witnesses, only two commissioners and one actuary are (as observed in the preceding note) allowed to attend; and the examination of every witness is required to be commenced, continued, and finished on the same day, and not at different times. "Regulations," &c. Art. 8. p. 386. of Sir J. Marriott's "Formulare." For the same purpose, the commissioners are permitted to use only the *standing interrogatories*, unless the Court direct *special* interrogatories to be proposed, though they may explain any of them to a witness, where it is necessary. If, however, witnesses answer, that "*they cannot say*," it is the duty of the commissioners to admonish them; that, as they have sworn to speak the truth, the whole truth, and nothing but the truth, they must answer to the best of their knowledge; or, where they do not know *absolutely*, that they must in such case answer *to the best of their belief*, concerning any fact or matter. "Formulare," p. 385.

† If the prize master neglect to produce witnesses before the commissioners, within forty-eight hours after the arrival of the prize, they must admonish him to bring them forward; and if he refuse or delay, or if the witnesses refuse to be examined, being also admonished of the consequence of their contumacy, (viz. *imprisonment of their persons for contempt, and confiscation of the ship and cargo,*) in such case the commissioners are, at the expiration of forty-eight hours, to certify the same to the judge of the high Court of Admiralty. "Regulations," &c. Art. 1.

sions, or other persons for that purpose commissioned, all such papers, passes, sea briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings, as shall be delivered up or found on board any ship. The captor, chief officer, or some other person who was present at the taking of the prize, and saw such papers and writings delivered up, or found on board at the time of capture, must also make oath that they are brought and delivered in, as they were received and taken, without any fraud, addition, subduction,* or embezzlement, or otherwise to account for the same, upon oath, to the satisfaction of the Court.†

On receipt of such books, papers, and writings, the commissioners must transmit the same without delay, and under seal, (together with copies of the examinations,) to the office of the registry of the Court of Admiralty, wherein such ship may be proceeded against in order to condemnation; but only such books, papers, and writings, shall be made use of and translated, as shall be agreed or insisted upon by the proctors of the several parties, captors or claimants, or (in case no claim be presented by the captor, or his proctor, agent, or register) as shall be necessary for ascertaining the property of such ship or vessel, and her cargo.‡

Recaptures of British ships.

If any ship, vessel, or boat, or any goods therein, which may have been taken as prize, shall appear and be proved, in any Court of Admiralty, to have belonged to any of his Majesty's subjects of Great Britain or Ireland, or of any other of his Majesty's dominions; and which ships, vessels, or boats were before taken or surprised by any of his Majesty's enemies, and afterwards again surprised and retaken by any ship of war,

* If, however, any commanders of his Majesty's ships of war, taking a prize, neglect to preserve, or to transmit the "*very originals*," entirely and without fraud to the Court of Admiralty, or some other Court of commissioners, the offender forfeits his share of the capture, and is liable to such farther punishment, as the nature of his offence may deserve, and a Court Martial impose. 22 Geo. 2. c. 33. stat. 2. s. 7. or the seventh article of war.

† "Instructions," Art. 3.

‡ 33 Geo. 3. c. 66. s. 26. 43 Geo. 3. c. 160. s. 26. "Regulations," &c. Art. 5. in "Formulare Instrumentorum," p. 384.

privateer, or other ship, vessel, or boat, under his Majesty's protection or obedience; in such case the recaptured ships or boats, and goods, and every part thereof, formerly belonging to his Majesty's subjects, shall, by a decree of the said Court of Admiralty, be restored to the former owners or proprietors, who shall pay the following rates in lieu of salvage, viz: If the recapture be effected by any of his Majesty's ships, *one-eighth part* of the ships, vessels, boats, and goods, respectively, to be restored, shall be paid to the flag-officers, captains, officers, seamen, marines, and soldiers on board such ships of war; and such salvage is to be divided among them in the manner and proportion for that purpose directed. But if such recapture be made by any privateer, or other ship, vessel, or boat, *one-sixth part* of the true value of the said ships, vessels, boats, and goods, shall, *without any deduction*, be paid to, and divided among, the owner or owners, officers and seamen, in such manner and proportions, as they shall have mutually agreed upon.*

Where, however, a recapture has been made by the joint operation of one or more of his Majesty's ships, and one or more privateer or privateers, the judge of the Admiralty Court shall order the owner or owners of such recaptured vessel or goods to pay such a salvage, as under the circumstances of the case shall to him appear reasonable, to the agent of the recaptors, and in such proportion as the Court shall adjudge.† But if the ship or vessel, thus retaken, shall have been fitted out by the enemy for war, she shall not be restored to the former owners or proprietors; but whether recaptured by a ship belonging to his Majesty, or by a privateer, shall be adjudged a lawful prize for the benefit of the captors.‡

If a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, with the recaptor's consent, to prosecute her voyage; nor is it necessary that they should proceed to adjudication till six months, or till the return of the ship to the port whence she sailed. Farther, by the

* 13 Geo. 2. c. 4. s. 18. 33 Geo. 3. c. 66. s. 42. 43 Geo. 3. c. 160. s. 41.
† 33 Geo. 3. c. 66. s. 42. 43 Geo. 3. c. 160. s. 41.
‡ Ibid.

recaptors' consent, the cargo may be unladen and disposed of before adjudication; and if such vessel does not return directly to the port whence she sailed, or if the recaptors have had no opportunity of proceeding regularly to adjudication within *six months*, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors, decree restitution to the former owners, paying salvage, upon such evidence as shall appear reasonable; the expense of such proceeding not to exceed the sum of fourteen pounds.*

Proceedings for the adjudication of prizes.

The captors of small armed ships and vessels belonging to the enemy, may include in one adjudication any number of such ships having a commission or letter of marque from the enemy; provided they do not exceed *six*, and are under fifty tons burthen, having been taken within three months before the application to the Admiralty for such adjudication.†

For the more speedy condemnation of prizes, the judge of the high Court of Admiralty of England, or of any other Court of Admiralty thereto authorized, or such persons as shall by them be commissioned for that purpose, shall, within five days after request made, finish the usual preparatory examination of the persons commonly examined in such cases, in order to inquire and prove whether the capture is a lawful prize or not. The proper monition, usual in such cases, shall be issued by the proper officer, and be duly executed by the proper persons, within three days after request made for that purpose; and in case no claim of such captured ship, vessel, or goods, be entered and made in the usual form, twenty days' notice be-

* 33 Geo. 3. c. 66. s. 44. 43 Geo. 3. c. 160. s. 43.

† 33 Geo. 3. c. 66. s. 11. 43 Geo. 3. c. 160. s. 9. Order of the Court of Admiralty, April 11, 1780, in Marriott's "Formulare," p. 4, 5. It is necessary here to remark, that the owners of all privateers are obliged to nominate and register a proctor in the Court, whence they obtain their commission or letter of marque; that service on him is binding on the commander, owners, and sureties, (41 Geo. 3. c. 96. s. 10.) and that such *owners* and *sureties* are liable to decrees immediately after sentence. (Ib. s. 12.) In case any privateer proceed to adjudication in any other Court than that whence the letters of marque have issued, they must pursue the same conduct *before the usual monition is granted*, and in case of appeal, the service of the process of the Court of Appeal on *him* will in like manner be effectual.

ing given after such monition; or if such claim be put in, and the claimant or claimants shall not, within five days after, give bond in the sum of sixty pounds sterling, to pay costs to the captor or captors, in case the ship, vessel, or goods, shall be adjudged lawful prize; the judge of such Admiralty Court shall then, on production of the examinations, together with all papers and writings found on board the prize, or upon oath that no such papers or writings were found, proceed to discharge or acquit such capture, or to condemn the same, as shall appear expedient to him, on perusal of the said preparatory examinations, papers, and writings. If, however, such claim be duly entered, and proper security be given, and no other examination appear to be requisite, the judge shall in such case proceed, within ten days, if possible, to give sentence respecting such capture. But where, on entering such claim, and the attestation thereupon, or producing the said papers and writings regarding the captured ship, vessel, or goods, and upon the said preparatory examinations, it shall appear doubtful to the judge, whether such capture be lawful prize or not, and he shall deem it necessary, for determining such doubt, to have an examination of witnesses on pleadings given in by the parties, and admitted by the judge, the judge shall, in such case, cause the capture to be forthwith appraised by skilful persons, nominated by the parties, and approved and appointed by the Court, and who shall be sworn duly to appraise the same according to the best of their skill and knowledge. And for this purpose the judge shall cause the goods found on board to be unladen, and (an inventory, if necessary, being previously taken by the marshal or deputy marshal of the admiralty) order them to be deposited in proper warehouses, with separate locks, of the collector and comptroller of the customs, or (if there be no comptroller or collector) of the naval officer, and of the agents of both captors and claimants, at the charge of the party requesting the same. After such appraisement, and within fourteen days after claim made, the judge shall take good and sufficient security from the claimants to pay the captors the full value thereof, according to such appraisement, in

Delivery of the property on bail.

case the same shall be adjudged a lawful prize.* He is also enjoined to take sufficient security from the captors to pay such costs as the Court shall think proper, in case the ship, vessel, or goods, shall not be condemned as lawful prize; and after such securities have been duly given, he shall make an interlocutory order for releasing or delivering the same to such claimant or claimants, or to his or their agents.†

In case, however, any claimant or claimants refuse to give the security required, the judge, on sufficient security being given by the captors, that they will pay the full value to the claimants according to the appraisement thereof, if the capture should not be condemned, shall proceed to make an interlocutory order for releasing and delivering the same to such captor or captors, or to their agents.‡ But as great injury is often

* No claimants are allowed to take cargo on bail, previously to hearing, without the consent of all the parties. 3 Rob. Adm. Rep. 178. But where all the parties interested are liable to sustain loss or damage from the captured cargoes either being perishing, or of a perishable nature, the Court of Admiralty has ordered, that in all cases, by consent of captor and claimant, or *upon attestation exhibited on the part of the claimant only, without the captor's consent*, the cargo, or the perishing or perishable part thereof, shall be delivered to him, on his specifying the quantity and quality of the cargo, and giving bail to answer the value thereof, if condemned, and also that he will abide the event of the suit. Such bail must be approved by the captor, or otherwise the persons giving the security, must swear that they are truly and severally worth the sum for which they give security; but if the parties cannot agree respecting the value of the cargo, a decree of appraisement may issue from the Court in order to ascertain the real value. Where, however, no claim is made, the captor may, on exhibiting an affidavit, specifying the quantity and quality of the perishable cargo, have a decree of appraisement and sale of such cargo, and bring the proceeds into Court in view of any claim, eventually to abide any future orders. Order of the Court of Admiralty, April 11, 1780, in Sir J. Marriott's "Formulare," p. 5, 6. Where a commission of appraisement and sale is granted by the judge of the Vice-admiralty Court, before final sentence, the proceeds of such sale shall not remain in the hands of the captors or their agents, but shall be deposited in the registry of the Court till final sentence be pronounced. 41 Geo. 3. c. 96. s. 7.

† 13 Geo. 2. c. 4. s. 3. 33 Geo. 3. c. 66. s. 23. 43 Geo. 3. c. 160. s. 29. Where a ship and cargo, or either of them, are condemned, with a general reservation of the question to whom, no copy of the interlocutory order is allowed to be delivered to either party, until a final condemnation take place. Order of the Court of Admiralty, dated August 1, 1793, in "Formulare," p. 23, 24.

‡ 33 Geo. 3. c. 66. s. 24. 43 Geo. 3. c. 160. s. 21.

sustained by the sale of captured property in remote parts of the British dominions, the colonial Vice-admiralty Courts are empowered, where farther proof is ordered, and the claimants of the property decline to take it on bail, to direct such property to be sent to England, (with the captor's and claimant's consent,) there to be sold by consignees nominated by both parties, and the proceeds of sale to be forthwith deposited in the bank of England, in the name of such consignees, subject to the final adjudication, expenses of freight, insurance, and other charges, attending the sale and transportation of the property. If, however, it shall appear to the Court that the captors unreasonably withhold their consent, they shall (in case of restitution) pay the difference in value of the property, at the time of such restitution, and of the produce thereof, in case such property had been sent for sale to England; the said difference to be ascertained in such manner as shall appear satisfactory to the Court for that purpose.

Thus far the regulations relate equally to ships of war and to privateers; but in all proceedings had upon captures made by any privateer in the Vice-Admiralty Courts in the West Indies or America, the owners are to be deemed and considered as parties to every part of such proceedings; and such owners, as well as the sureties, are jointly and severally liable to all orders and decrees made therein immediately after final sentence, without any farther personal service on the commander, or putting him in contempt by process of contumacy.

Appeals. In case, however, any captors or claimants shall not rest satisfied with the sentence, or interlocutory decree having the force of a definitive sentence, pronounced in the high Court of Admiralty of England, or in any colonial Vice-admiralty Court, the parties aggrieved may appeal to the commissioners appointed for determining appeals in prize causes, in like manner as such appeals have usually been interposed;* provided the appellants give sufficient security that they will effectually pro-

* The 33 Geo. 3. c. 66. s. 28. specifies *fourteen days* after pronunciation of the decree, which is the time allowed by the present practice of the Admiralty Court.

secute such appeal, answer the condemnation, and pay all costs, if the sentence of the respective Courts be affirmed. But the execution of such sentence is not to be suspended by the appeal, (excepting in the cases hereafter mentioned,) if the parties appellate give sufficient security, to be approved of by the Court where such sentence was given, that they will restore the property in litigation, or the value thereof, to the appellants, in case the sentence or the interlocutory decree appealed from, shall be reversed.* And in cases of appeal from a colonial Vice-admiralty Court, the property in litigation may, at the appellant's request, be sent by the Court to England for sale, and the proceeds be deposited in the bank, in the manner already specified;† or if the property shall have been converted by sale, the proceeds thence arising shall be consigned to England and deposited in a similar manner. Should any question or difficulty arise respecting any property or proceeds thus sent to England, either before or after any such appeal, at any time after their arrival in England, or respecting the sale or proceeds thereof, the captors or claimants may, on giving notice to the adverse parties, apply by their proctors to the high Court of Admiralty, (if before the prosecution of the appeal,) or (afterwards) lords commissioners of appeal, for their directions concerning the sale or management of such property or proceeds.‡

If any person, not being a party in the first instance, appeal from a definitive sentence, or interlocutory decree having the force of such sentence, such person, or his or her agent or agents, must at the same time enter his, her, or their claim or claims, as their appeal will otherwise be null and void.§

In all prize causes, whether tried in the English Admiralty, or in a colonial Vice-admiralty Court, all persons interested, whether they be or be not parties in the first instance, may take out an inhibition, and prosecute an appeal within *twelve calen-*

* 33 Geo. 3. c. 66. s. 28. 43 Geo. 3. c. 160. s. 27.

† *Supra*, p. 144.

‡ 41 Geo. 3. c. 96. s. 9.

§ 33 Geo. 3. c. 66. s. 29. 43 Geo. 3. c. 160. s. 28.

dar months, to be computed from the day of the date of the sentence, or decree appealed from. But if no inhibition be taken out before the twelve months elapse, no appeal will be allowed to be prosecuted, nor will any inhibition be granted, but the said sentence, or interlocutory decree, is to stand confirmed as to such person.*

In certain special prize causes, however, to be mentioned in his Majesty's order or orders in council, his Majesty may authorize the persons interested (whether parties or not in the first instance, and in whatever Court the decree or sentence appealed from may have been pronounced) to take out inhibitions for prosecuting appeals *after the expiration of twelve months*; and the lords commissioners of appeals may, if distribution has not taken place, permit an appeal to be prosecuted after that period has elapsed, where, on special cause shown, they shall deem it reasonable to grant such permission;† but *if* it shall appear to the satisfaction of the lords commissioners of appeals in prize causes, that distribution has been made of the proceeds of the prizes, at or after the time or times when the right of appealing would have been barred, if no such order had been made, and before notice of such order duly given to the captors, the said captors are not liable to make compensation to the claimants, provided they duly comply with the following regulation,‡ viz. Where his Majesty shall authorize such appeals, the captors shall, within a reasonable time, at the requisition of the claimants, deliver a true copy of the account of sales, and of all proceedings had under the authority of the sentence or decree, pronounced in the Court below, to his Majesty's procurator-general, who is authorized and required to defend all such appeals, and in such manner as his Majesty's advocate-general shall direct. But if the captors shall neglect to comply with these regulations, or to obey such farther orders as the lords commissioners may deem necessary, they forfeit all claim to any benefit or discharge under the act above de-

* 38 Geo. 3. c. 38. s. 2. 43 Geo. 3. c. 160. s. 29.

† 38 Geo. 3. c. 38. s. 3. 43 Geo. 3. c. 160. s. 29.

‡ 38 Geo. 3. c. 38. s. 3.

tailed, and are liable to be proceeded against in the same manner as if the appeal had been duly entered within the period of twelve months, allowed for appeals from the decisions of the Courts below.*

In cases of appeal, interposed in the manner already specified, the judge of the Court of Admiralty may, at the request and expense either of the captors or claimants, (or of the claimant only, where the privilege is reserved in favour of the claimant by any treaty or treaties subsisting between his Majesty and foreign powers,) order such capture to be appraised, (unless the parties shall otherwise agree upon the value thereof,) and direct an inventory to be made. Next, the judge is required to take security for the full value thereof, and he may order the capture to be delivered to the party giving such security, notwithstanding such appeal; but if any difficulty shall arise, or there be any sufficient objection to the giving or taking of security, the judge shall, at the request of either of the parties, order the captured goods and effects to be entered, landed, and sold by auction, under the care of the proper officers of the customs, and under the inspection of persons to be appointed by the claimants and captors. The money, arising by such sale, shall be brought into Court, and by the register, or his deputy or deputies, be deposited in the bank of England; or if the captors and claimants agree, such money may be vested in some public securities at interest, in the names of the register, and of such trustees as the captors and claimants shall appoint, and the Court shall approve. And if such security be given by the claimants, the judge shall give the captured vessel a pass under his seal, to prevent her from being again taken by his Majesty's subjects in her destined voyage.†

Where the sentence, or interlocutory decree, having the force of a definitive sentence, shall be finally reversed, after the sale of any ship or goods, the net proceeds of such sale (after payment of all expenses attending the same) shall be

* 38 Geo. 3. c. 28. s. 4.

† 33 Geo. 3. c. 66. s. 31. 43 Geo. 3. c. 160. s. 30.

deemed to be the full value of such ship and goods ; nor shall the parties appellate, and their securities, be answerable for the value beyond the amount of such net proceeds, unless such sale appear to have been made fraudulently, or without due care.*

With regard to the practice of the Court of Appeals, as many inconveniences formerly arose from delays in serving the processes of that Court, it is now provided, that in all cases of captures by his Majesty's ships, a service upon his Majesty's proctor shall be deemed an effectual service upon the commander of the ship making such capture. Farther, on taking out letters of marque, the owners of all the ships or vessels, for which such letters shall be granted, must nominate and register in the Court granting such letter of marque, a proctor, exercent in the Court of Appeal in prize causes, with power of revocation and substitution ; and service of process on such proctor shall be deemed effectual service upon the commander, owners, and sureties of privateers, in all cases where an appeal has been declared in the Court below, *within fourteen days after sentence*. But neither his Majesty's proctor, nor any nominated proctor, is answerable for any damages arising to their parents respectively, from non-appearance in their behalf in the Court of Appeal, unless such proctor shall have accepted the said nomination by a writing under his hand ; and, also, unless the said parties shall have sufficiently instructed him to appear and defend the appeal.† Where, however, no appeal has been entered in the manner, and within the time above specified, it shall be deemed sufficient service upon the parties, if the process be served either upon the commander of the king's ship, or upon his registered agent in this kingdom, or upon his Majesty's law-officer in the Court below ; or in cases of captures by privateers, if such process be served upon the commander of the privateer, or upon any or either of the sureties to the letters of marque.‡

* 33 Geo. 3. c. 66. s. 32. 43 Geo. 3. c. 160. s. 31.
† 41 Geo. 3. c. 96. s. 10.
‡ Ibid. s. 11.

NOTE IV.

The act of the 3d of March, 1819, commented on in the cases of the *United States* v. *Smith*, in the text, and in the other cases of piracy before the Court at the present term, was continued in force, amended, and enlarged, by the following act, passed at the last session of Congress.

An Act to continue in force "An Act to protect the commerce of the United States, and punish the crime of piracy," and also to make further provision for punishing the crime of piracy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first, second, third, and fourth sections of an act, entitled, "An Act to protect the commerce of the United States, and punish the crime of piracy," passed on the third day of March, one thousand eight hundred and nineteen, be, and the same are hereby, continued in force, from the passing of this act, for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Sec. 2. And be it further enacted, that the fifth section of the said act be, and the same is hereby, continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects, as fully as if the duration of the said section had been without limitation.

Sec. 3. And be it further enacted, that if any person shall, upon the high seas, or in any open road-stead, or in any haven, basin, or bay, or in any river, where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and being thereof convicted before the Circuit Court of the United States, for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruize or enterprize, or being

of the crew or ship's company, of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit robbery, such person shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: Provided, that nothing in this section contained shall be construed to deprive any particular State of its jurisdiction over such offences, when committed within the body of a county, or authorize the Courts of the United States to try any such offenders, after conviction or acquittance, for the same offence in a State Court.

Sec. 4. And be it further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labour by the laws of either of the States or Territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such a negro or mulatto on board any such ship or vessel, with intent, as aforesaid, such citizen, or person, shall be adjudged a pirate; and on conviction thereof before the Circuit Court of the United States, for the district wherein he may be brought or found, shall suffer death.

Sec. 5. And be it further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine, or detain, or aid and abet in forcibly confining, or detaining, on board such ship or vessel, any negro or mulatto, not held to service by the laws of either of the States or Territories of the United States, with intent to make such negro or

mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto, not held to service as aforesaid, or shall, on the high seas, or any where on tide water, transfer, or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States, for the district wherein he shall be brought or found, shall suffer death.

H. CLAY,
Speaker of the House of Representatives.
JOHN GAILLARD,
President of the Senate pro tempore.

Washington, May 15, 1820. Approved:
JAMES MONROE.

NOTE V.

Additional Documents on the subject of the Neutrality of the United States in the present war between Spain and her Colonies. Vide, ante, vol. IV. APPENDIX, *Note* II.

[TRANSLATION.]

GENERAL DON FRANCISCO DIONISIO VIVES TO THE SECRETARY OF STATE.

SIR—In conformity with the orders of my government, which were communicated to Mr. Forsyth on the 16th of December

last, by his excellency the Duke of San Fernando and Quiroga, and with the earnest desire of the king, my master, to see a speedy adjustment of the existing difficulties which obstruct the establishment, on a permanent basis, of the good understanding so obviously required by the interests of both powers, I have the honour to address you, and frankly to state to you, that my august sovereign, after a mature and deliberate examination, in full council, of the treaty of 22d February, of the last year, saw, with great regret, that, in its tenor, it was very far from embracing all the measures indispensably requisite to that degree of stability which, from his sense of justice, he was anxious to see established in the settlement of the existing differences between the two nations.

The system of hostility which appears to be pursued in so many parts of the Union, against the Spanish dominions, as well as against the property of all their inhabitants, is so public and notorious, that, to enter into detail, would only serve to increase the causes of dissatisfaction ; I may be allowed, however, to remark, that they have been justly denounced to the public of the United States, even by some of their own fellow-citizens.

Such a state of things, therefore, in which individuals may be considered as being at war, while their governments are at peace with each other, is diametrically opposed to the mutual and sincere friendship, and to the good understanding which it was the object of the treaty (though the attempt has failed) to establish, and of the immense sacrifices consented to by his Majesty to promote.

These alone were motives of sufficient weight imperiously to dictate the propriety of suspending the ratification of the treaty, even although the American envoy had not at first announced, in the name of his government, and subsequently required, of that of Spain, a declaration which tended directly to annul one of its most clear, precise, and conclusive articles, even after the signature and ratification of the treaty.

The king, my master, influenced by considerations so powerful as to carry with them the fullest evidence, has, therefore,

judged it necessary and indispensable, in the exercise of his duties as a sovereign, to request certain explanations of your government; and he has, in consequence, given me his commands to propose to it the following points; in the discussion and final arrangement of which, it seems proper that the relative state of the two nations should be taken into full consideration.

That the United States, taking into due consideration the scandalous system of piracy established in, and carried on from, several of their ports, will adopt measures satisfactory and effectual, to repress the barbarous excesses, and unexampled depredations, daily committed upon Spain, her possessions, and properties; so as to satisfy what is due to international rights, and is equally claimed by the honour of the American people.

That, in order to put a total stop to any future armaments, and to prevent all aid whatsoever being afforded from any part of the Union, which may be intended to be directed against, and employed in the invasion of, his Catholic Majesty's possessions in North America, the United States will agree to offer a pledge, (a dar una seguiradad,) that their integrity shall be respected.

And, finally, that they will form no relations with the pretended governments of the revolted provinces of Spain situate beyond sea, and will conform to the course of proceeding adopted, in this respect, by other powers in amity with Spain.

Extract of a Letter from General Vives to the Secretary of State, dated April 24th, 1820.

It is evident that the scandalous proceedings of a number of American citizens, the decisions of several of the Courts of the Union, and the criminal expedition set on foot within it for the invasion of his Majesty's possessions in North America, at the very period when the ratification was still pending, were diametrically opposite to the most sacred principles of amity, and to the nature and essence of the treaty itself. These hostile proceedings were, notwithstanding, tolerated by the

federal government, and thus the evil was daily aggravated; so that the belief generally prevailed throughout Europe, that the ratification of the treaty by Spain, and the acknowledgment of the independence of the rebellious transatlantic colonies by the United States, would be simultaneous acts.

Extract of a Letter from the Secretary of State to General Vives, dated May 3d, 1820.

I am now instructed to repeat the assurance which has already been given you, that the representations which appear to have been made to your government of a system of hostility, in various parts of the Union, against the Spanish dominions, and the property of Spanish subjects; of decisions marked with such hostility by *any* of the Courts of the United States, and of the toleration in any case of it by this government, are unfounded. In the existing unfortunate civil war between Spain and the South American Provinces, the United States have constantly avowed, and faithfully maintained, an impartial neutrality. No violation of that neutrality by any citizen of the United States has ever received sanction or countenance from this government. Whenever the laws, previously enacted for the preservation of neutrality, have been found, by experience, in any manner defective, they have been strengthened by new provisions and severe penalties. Spanish property, illegally captured, has been constantly restored by the decisions of the tribunals of the United States, nor has the *life itself* been spared of individuals guilty of piracy, committed upon Spanish property on the high seas.

Should the treaty be ratified by Spain, and the ratification be accepted by and with the advice and consent of the Senate, the boundary line recognized by it, will be respected by the United States, and due care will be taken to prevent any transgression of it. No new law or engagement will be necessary for that purpose. The existing laws are adequate to the suppression of such disorders, and they will be, as they have been, faithfully carried into effect. The miserable disorderly move-

ment of a number not exceeding seventy lawless individual stragglers, who never assembled within the jurisdiction of the United States, into a territory to which his Catholic Majesty has no acknowledged right, other than the yet unratified treaty, was so far from receiving countenance or support from the government of the United States, that every measure necessary for its suppression was promptly taken under their authority; and from the misrepresentations which have been made of this very insignificant transaction to the Spanish government, there is reason to believe that the pretended expedition itself, as well as the gross exaggerations which have been used to swell its importance, proceed from the same sources, equally unfriendly to the United States and to Spain.

As a necessary consequence of the neutrality between Spain and the South American Provinces, the United States can contract no engagement not to form any relations with those Provinces. This has explicitly and repeatedly been avowed and made known to your government, both at Madrid and at this place. The demand was resisted, both in conference and written correspondence, between Mr. Erving and Mr. Pizarro.

Mr. Onis had long and constantly been informed, that a persistance in it would put an end to the possible conclusion of any treaty whatever. Your sovereign will perceive, that as such an engagement cannot be contracted by the United States consistently with their obligations of neutrality, it cannot justly be required of them, nor have any of the European nations ever bound themselves to Spain by such an engagement.

Extract of a Letter from General Vives to the Secretary of State, dated May 5th, 1820.

[TRANSLATION.]

SIR—In answer to your note of the 3d instant, and in pursuance of what I expressed to you in both our late conferences, I have to state to you, that I am satisfied upon the first point of the proposals contained in my note of the 14th ultimo, and am

persuaded, that if the existing laws enacted for the suppression of piracy, should prove inadequate, more effectual measures will be adopted by your government for the attainment of that important object.

I also admit as satisfactory, the answer given to the second point; but I cannot assent to your assertion, that the laws of this country have always been competent to the prevention of the excesses complained of; it being quite notorious that the expedition alluded to, has not been the only one set on foot for the invasion of his Majesty's dominions; and it is, therefore, not surprising, that the king, my lord, should give credit to the information received in relation to that expedition, or that he should now require of your government a pledge, that the integrity of the Spanish possessions in North America shall be respected.

I mentioned to you in conference, and I now repeat it, that the answer to the third point was not such as I could, agreeably to the nature of my instructions, accept, as being satisfactory; and that, although his Majesty might not have required of any of the European governments the declaration which he has required of yours, yet that ought not to be considered as unreasonable, it being well known to the king, my master, that those governments, so far from being disposed to wish to recognise the insurgent governments of the Spanish colonies, had declined the invitation, intimated to them some time past, by yours, to acknowledge the pretended Republic of Buenos Ayres.

Extract of a Letter from the Secretary of State to General Vives, dated May 8th, 1820.

The assurances which you had given me in the first personal conference between us, of your own entire satisfaction with the explanations given you upon *all* the points on which you had been instructed to ask them, would naturally have led to the expectation, that the promise which you was authorized to give would at least not be withheld. From your letter of the 5th

instant, however, it appears that no discretion has been left to you, to pledge even his Majesty's promise of ratification, in the event of your being yourself satisfied with the explanations upon *all* the points desired; that the only promise you can give is *conditional*, and the condition a point upon which your government, when they prescribed it, could not but know it was *impossible* that the United States should comply; a condition incompatible with their independence, their neutrality, their justice, and their honour.

It was also a condition which his Catholic Majesty had not the shadow of a *right* to prescribe. The treaty had been signed by Mr. Onis with a full knowledge that no such engagement as that contemplated by it, would ever be acceded to by the American government, and after long and unwearied efforts to obtain it. The differences between the United States and Spain had no connection with the war between Spain and South America. The object of the treaty was to settle the boundaries, and adjust and provide for the claims between your nation and ours; and Spain at no time could have a right to require that any stipulation concerning the contest between her and her colonies should be connected with it. As his Catholic Majesty could not justly require it, during the negotiation of that treaty, still less could it afford a justification for withholding his promised ratification after it was concluded.

The proposal which, at a prior period, had been made by the government of the United States, to some of the principal powers of Europe, for a recognition, in concert, of the independence of Buenos Ayres, was founded, as I have observed to you, upon an opinion then and still entertained, that this recognition must, and would, at no very remote period, be made by Spain herself; that the joint acknowledgment by several of the principal powers of the world at the same time, might probably induce Spain the sooner to accede to that necessity, in which she must ultimately acquiesce, and would thereby hasten an event propitious to her own interests, by terminating a struggle in which she is wasting her strength and resources, without a possibility of success; an event ardently to be desired by every

friend of humanity, afflicted by the continual horrors of a war, cruel and sanguinary almost beyond example; an event not only desirable to the unhappy people who are suffering the complicated distresses and calamities of this war, but to all the nations having relations of amity and commerce with them. This proposal, founded upon such motives, far from giving to Spain the right to claim of the United States an engagement not to recognise the South American governments, ought to have been considered by Spain as a proof at once of the moderation and discretion of the United States; as evidence of their disposition to discard all selfish or exclusive views in the adoption of a measure which they deemed wise and just in itself, but most likely to prove efficacious, by a common adoption of it, in a spirit entirely pacific, in concert with other nations, rather than by a precipitate resort to it, on the part of the United States alone.

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2. The powers granted to Congress are not exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. *Id.* 49

3. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the Legislature of the State in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. *Id.* 49

4. In all other classes of cases, the States retain concurrent authority with Congress. *Id.* 49

5. But in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being the supreme law of the land, are of paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield. *Id.* 49

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3. The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency; but the liability of the principal depends upon the facts, 1st. That the act was done in the exercise, and, 2dly. Within the limits of the power delegated: And in ascertaining these facts as connected with the execution of written instruments, except deeds, parol testimony is admissible. *Id.* 337
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LOCAL LAW.

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2. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such possession cannot exist if the party having the better right takes actual possession in pursuance of his right. *Id.* 121

3. One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. *Id.* 124

4. The statute of limitations of Tennessee does not, like other statutes of limitation, protect a mere naked possession, but its operation is limited to a possession acquired and held under a grant, or a deed founded on a grant. *Id.* Note *a*. 121

5. Previous to the year 1775, H. S. of Virginia, cohabited with A. W., and had by her the appellants, whom he recognised as his children. In July, 1775, he made his will, which was duly proved after his decease, in which he described them as the children of himself, and of his wife A., and devised the whole of his property to them and their mother. In *June*, 1776, he was appointed a Colonel in the Virginia line, upon the continental establishment, and died in the service, having, in July, 1776, intermarried with the mother, and died, leaving her pregnant with a child who was afterwards born, and named R. S. After the death of H. S., and the birth of his posthumous son, a warrant for a tract of military lands was granted by the State of Virginia to the posthumous son R. S., who died in 1796, in his minority, without wife or children, and without having located or disposed of the warrant. His mother also died before 1796. *Held*, that the children of H. S. were not entitled to the lands, as devisees under his will, under the act of Assembly; nor did the will so far operate, as to render them capable of taking under the act, as being named his legal representatives in the will. *Stevenson's heirs* v. *Sullivant*, 207. 255

6. The appellants were not legitimated by the marriage of H. S. with their mother, and his recognition of them as his children, under the 19th sec. of the act of descents of Virginia, of 1785, which took effect on the 1st of January, 1787, and provides, that "where a man, having by a woman one or more children, shall afterwards inter-

marry with such woman, such child or children, if recognised by him, shall be thereby legitimated." *Id.* 257

7. The appellants were not, as illegitimate children of H. S. and A. W., capable of inheriting from R. S. under the 18th sec. of the same act of descents, which provides that, "In making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is, or hath been, an alien. Bastards also shall be capable of inheriting, or of transmitting inheritance, *on the part of their mother*, as if they had been lawfully begotten of such mother." *Id.* 260
8. The following entry is invalid for want of that certainty and precision required by law: "William Perkins and William Hoy enter 6,714 acres of land on a treasury warrant, No. 10,692, to join Lawrence Thompson and James M'Millan's entry of 1,000 acres that is laid on the adjoining ridge, between Spencer's creek and Hingston's fork of Licking, on the east, and to run east and south for quantity." The entry referred to in the foregoing was as follows: "9th of December 1782, Lawrence Thompson and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking, and Spencer's creek, *a west branch of said fork*, to include a large pond, in the centre of a square, and a white oak tree marked X, also an elm tree marked VS, near the side of the pond." *Perkins et al.* v. *Ramsey*, 269
9. There are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law. *Polk's Lessee* v. *Wendell*, 293. 303.
10. A grant raises a presumption that every prerequisite to its issuing has been complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void. *Id.* 303
11. Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of land: *Held*, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies; but that in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in Court, or inspected under a commission, or the keeper of the document examined as a witness, from which the Court might ascertain the fact of the non-existence of the contested entries. *Id.* 310
12. In such a case, certificates from the secretary's office of North Carolina, introduced to prove,

that on entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the names of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible. *Id.* 311

13. *It seems*, that whether a grant be absolutely void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity as against an innocent purchaser without notice. *Id.* 311

14. The 17th section of the act, incorporating the Mechanics' Bank of Alexandria, providing, "that all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the President, and countersigned by the cashier; and the funds of the corporation shall, in no case, be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts, and undertakings implied in law. *Mechanics' Bank v. Bank of Columbia*, 326. 335

15. It is essential to the validity of a grant, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony to ascertain precisely what is conveyed. *Blake v. Doherty*, 359. 362.

16. Natural objects called for in a grant may be proved by testimony, not found in the grant, but consistent with it. *Id.* 362

17. The following description, in a patent of the land granted, is not void for uncertainty, but may be made certain by extrinsic testimony: "A tract of land in our middle district, on the west fork of Cane creek, the waters of Elk river, *beginning at a hiccory*, running north 1000 poles to a white oak; then east, 800 poles, to a stake; thence west 800 poles to the beginning, as per plat hereunto annexed doth appear." *Id.* 389

18. The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose. *Id.* 364

19. A general plan made by authority, conformably to an act of the local legislature, may also be submitted, with other evidence, to the jury, to avail *quantum valere potest*, in ascertaining boundary. *Id.* 364

20. But a demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act. *Id.* 365

21. The boundary of the State of Kentucky extends only to low water mark on the western side of the river Ohio; and does not include a peninsula, or island, on the western or north western bank, separated from the main land by a channel or bayou, which is filled with water

only when the river rises above its banks, and is, at other times, dry. *Handly's Lessee* v. *Anthony*, 374

22. When a river is the boundary between two nations or States, if the property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its domain, and the newly erected State extends to the river only, and the low water mark is its boundary. *Id.* 379
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24. History of the Spanish law. *Id.* 33
25. Account of the *Fuero Juzgo*. *Id.* 34
26. Of the *Fuero Viejo*. *Id.* 36
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PIRACY.

1. A commission issued by *Aury*, as "Brigadier of the Mexican republic;" (a republic whose existence is unknown and unacknowledged,) or as "Generalissimo of the Floridas," (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea. *United States* v. *Klintock*, 144. 149
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4. The opinion of this Court in the case of the *United States* v. *Palmer*, *ante*, *Vol.* III. *p.* 610. commented on and explained. *Id.* 150
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8. Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy, by the law of nations and by the act of Congress. *Id.* *United States* v. *Furlong et al.* 161. 184.
9. Citations to show that piracy is defined by the law of nations. *Id.* Note *a.* 163
10. The 8th sec. of the act of the 30th of April, 1790, c. 36. for the punishment of certain crimes against the United States, is not repealed by the act of the 3d of March, 1819, c. 76. to protect the commerce of the United States, and to punish the crime of piracy. *United States* v. *Furlong, alias Hobson, et al.* 184. 192
11. In an indictment for a piratical murder, (under the act of the 30th of April, 1790, c. 36. s. 8.) it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel. *Id.* 194
12. The words "out of the jurisdiction of any particular *State*," in the act of the 30th of April, 1790, c. 36. s. 8. are construed to mean out of the jurisdiction of any particular State *of the Union*. *Id.* 200
13. A vessel lying in an open roadstead of a foreign country, is "upon the high seas" within the act of 1790, c. 36. s. 8. *Id.* 200
14. A citizen of the United States fitting out a vessel in a port of the United States, to cruise against a power in amity with the United States, is not protected by a foreign commission from punishment for any offence *committed against the property of citizens of the United States*. *Id.* 201
15. The Courts of the United States have jurisdiction under the act of the 30th of April, 1790, c. 36. of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States, as if she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation. *United States* v. *Holmes*, 412. 416
16. In the same case, and under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States; or on board a vessel of the United States by a foreigner; or by a citizen or foreigner on board of a piratical vessel, the offence is equally cognizable by the Courts of the United States. *Id.* 417
17. It makes no difference in such a case, and under the same act, whether the offence was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea though he was not thrown overboard. *Id.* 418
18. In such a case, and under the

same act, where the vessel, from on board of which the offence was committed, sailed from Buenos Ayres where she had enlisted her crew; but it did not appear by legal proof that she had a commission from the government of Buenos Ayres, or any ship's papers or documents from that government, or that she was ever recognised as a ship of that nation, or of its subjects, or who were the owners, where they resided, or when or where the vessel was armed or equipped; but it did appear in proof, that the captain and crew were chiefly Englishmen, Frenchmen, and citizens of the United States; that the captain was by birth a citizen of the United States, domiciled at Baltimore, where the privateer was built: *Held*, that the burthen of proof of the national character of the vessel was on the prisoners. *Id.* 418

19. Late act of Congress for the punishment of piracy. *Appendix*, Note IV. 149

PRACTICE.

1. An information for a *quo warranto*, to try the title to an office, cannot be maintained but at the instance of the Governments; and the consent of parties will not give jurisdiction in such a case. *Wallace* v. *Anderson*, 291

2. The District Judge cannot sit in the Circuit Court in a cause brought by writ of error from the District to the Circuit Court, and the cause cannot in such a case be brought from the Circuit to this Court upon a certificate of a division of opinion of the judges. *United States* v. *Lancaster*, 433

See CHANCERY, 4, 5, 6, 7.

PRIZE, 2, 3. 5. 11.

PRIZE.

1. A question of proprietary interest on farther proof. Restitution decreed. *The Venus*, 127. 130

2. Captors' costs and expenses ordered to be paid by the claimant, it being his fault that defective documents were put on board. *Id.* 131

3. On farther proof, the affidavit of the claimant is indispensably necessary. *Id.* 127

4. A question of proprietary interest on farther proof. Restitution decreed, with costs and expenses to be paid by the claimant. *The London Packet*, 132

5. In general, the circumstance of goods being found on board an enemy's ship raises a legal presumption that they are enemy's property. *Id.* 137

6. Upon a piratical capture, the property remains in the original owners, and cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried. *The Josefa Segunda*, 338. 357

7. But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be devested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by

the captor, of the revenue or other municipal laws of the neutral country into which the prize may be carried. *Id.* 358

8. *Quære*, Whether, when a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize, and bring it into our ports for adjudication? *La Amistad de Rues*, 385. 388

9. In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages. *Id.* 389

10. In cases of violation of our neutrality by any of the belligerents, if the prize comes *voluntarily* within our territory, it is restored to the original owners by our courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses during the pendency of the suit, and does not extend to the infliction of vindictive damages, as in ordinary cases of marine torts. *Id.* 389

11. Where the original owner seeks for restitution in our Courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the Court will decline to exercise its jurisdiction. *Id.* 391

12. A question of proprietary interest on farther proof. *The Atalanta*, 433

13. Note on the subject of Prize Law. *Appendix*, Note III. 52

14. Prize Chapters of the *Consolato del Mare*. *Id.* 54

15. Extracts from the French Prize Ordinance of 1400. *Id.* 62

16. French Ordinance of 1584. *Id.* 65

17. Swedish Ordinance of 1715. *Id.* 72

18. Danish Ordinance of 1659. *Id.* 75

19. Danish Proclamation of Neutrality of 1793. *Id.* 75

20. French Prize Ordinance of 1681. *Id.* 80

21. French Ordinance of 1694. *Id.* 85

22. French Ordinance of 1696. *Id.* 86

23. French Ordinance of 1744. *Id.* 87

24. French Ordinance of 1778. *Id.* 88

25. Danish Prize Instructions of 1810. *Id.* 91

26. Ordinances of Congress from 1775 to 1782, 103

27. British Statutes and Prize Instructions, 129

28. Additional documents on the neutrality maintained by the United States during the present war between Spain and her American Colonies. *Appendix*, Note V. 151

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TENANT IN COMMON.

See LOCAL LAW, 3.

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